

Errata.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1970, No. 87

UNITED STATES vs. DISTRICT COURT IN AND FOR THE COUNTY OF
EAGLE AND STATE OF COLORADO, et al.

Motion of Fort Mojave Tribe of Indians for Leave to File Suggestion of Interest
and Points and Authorities In Support Thereof, and Order Thereon.

* * * * *

APPENDIX B.

CONFLICTS OF INTEREST IN PROCEEDINGS BEFORE THE SUPREME COURT OF THE UNITED STATES

A Preface To Disaster For The American Indian People

William H. Veeder

* * * * *

Page iii	(a)(2)(i) Principles of Western and Indian law re- specting interpretations of conveyances applied by Supreme Court in Winters	54	change to 55
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IN THE
Supreme Court of the United States

October Term, 1970
No. 87

UNITED STATES,

Petitioner,

vs.

DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE
and STATE OF COLORADO, *et al.*

**Motion of Fort Mojave Tribe of Indians for Leave to
File Suggestion of Interest and Points and Au-
thorities in Support Thereof, and Order Thereon.**

COMES NOW the Fort Mojave Tribe of Indians, by
Raymond C. Simpson, Tribal Attorney, at the discre-
tion and the authority of the Tribal Council and with-
out entering their appearance as a party, moves the
Court for leave to file their Suggestions of Interest
and Points and Authorities in Support Thereof.

Dated: April 8, 1971.

RAYMOND C. SIMPSON,
*Tribal Attorney for Fort Mojave
Tribe of Indians.*

IN THE
Supreme Court of the United States

October Term, 1970

No. 87

UNITED STATES,

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**Order on Motion of Fort Mojave Tribe of Indians for
Leave to File Suggestions of Interest and Points
and Authorities in Support Thereof.**

Based upon the foregoing motion, and good cause
appearing therefore, IT IS ORDERED that the Fort
Mojave Tribe of Indians' Motion for leave to file a
Suggestion of Interest and Points and Authorities in
support thereof is granted.

Dated: This day of, 1971.

UNITED STATES SUPREME COURT
JUDGE.



IN THE

Supreme Court of the United States

October Term, 1970

No. 87

UNITED STATES,

Petitioner,

vs.

DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE
and STATE OF COLORADO, *et al.*

Suggestion of Interest of the Fort Mojave Tribe of Indians and Points and Authorities in Support Thereof.

COMES NOW the Fort Mojave Tribe of Indians by Raymond C. Simpson, Tribal Attorney, under the direction and by the authority of their Tribal Council, without submitting to the jurisdiction of the Court, and appearing specially, solely and only for the purpose of suggesting to this Honorable Court that said Indian Tribe has a direct, immediate, and vital interest in the subject matter of the above-entitled action and that they are indispensable parties thereto by reason of the following:

- 1. Prior Adjudication of the Right to Water by the Fort Mojave Tribe of Indians Clearly Established Their Interest in the Subject Matter of the Case at Bar.**

This Honorable Court in *Arizona v. California*, 373 U.S. 546, 83 S. Ct. 1468 decreed that the Fort Mojave Tribe has clear and definitive legal rights to use the

water from the mainstream of the Colorado River when they said:

"We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations."

These legal rights to the use of said water accords to them an entitlement of approximately 122,640 acre feet of water annually. At least seventy percent (70%) of the water flowing to the Fort Mojave Indian Reservation from the mainstream of the Colorado River originates in the State of Colorado. A very substantial part of that water, so essential to the implementation of the portion of the Court's decree in *Arizona v. California, supra*, regarding the Fort Mojave Indians, is the Eagle River. Without this source of water supply, the water rights of the Mojaves would, of course, become vacuous since the entitlement of the Mojaves to water from the mainstream of the Colorado River is totally dependent upon the water supplied by its tributaries. As a consequence, any reduction of water in the Colorado River by reason of Eagle River (tributary) use clearly creates an intolerable plight for the Fort Mojave Indians because such upstream use will materially reduce the quantities of water entering the mainstream of the Colorado River which would otherwise flow to the Fort Mojave Indian Reservation. This is particularly significant since it is a matter of indisputable record that the Colorado River has been most seriously over-appropriated. In fact, it is also a matter of record that current water yields reaching the Fort Mojave Indian Reservation

are falling far short of the anticipated flows when the River was originally apportioned between the Upper and Lower Basins of the Colorado.

Examination of the Map of the Colorado River Basin appended hereto as Appendix A, and by reference made a part hereof, graphically illustrates the flow of the tributaries into the mainstream of the Colorado River and its flow into and through the Fort Mojave Reservation.

It is, of course, elemental that the said decreed rights to the use of water by the Fort Mojave Indian Tribe in the mainstream of the Colorado River and its tributaries are interests in real property of the highest dignity. Those rights, as asserted above, although in the mainstream of the Colorado River, in order to be meaningful, must extend to the sources of that water, i.e., the tributaries of that stream such as the Eagle River. It is this fundamental property interest of the Fort Mojave Indians that causes them to have a direct, immediate, and vital interest in the subject matter of the above-entitled case plus making them an indispensable party thereto. Any other conclusion has been carefully characterized by William H. Veeder, attorney at law and well-known Conservation Specialist for the Bureau of Indian Affairs, in his special Report to the Commissioner of Indian Affairs entitled "Conflicts of Interest In Proceedings Before the Supreme Court of the United States", as "A Preface To Disaster For The American Indian People." A true and correct copy thereof is appended hereto as Appendix B, and by reference made a part hereof. This Report was released on March 23, 1971, and is concerned exclusively with the *Eagle River* Case No. 87 and Water Division No. 5 Case No. 812.

2. The Fort Mojave Tribe and Other Tribes Similarly Situated Will Be Irreparably Damaged if Their Rights to the Use of Water Are to Be Henceforth Adjudicated in State Courts.

On March 24, 1971, one day after release of the said Veeder Report, this Honorable Court rendered a decision in the Eagle River Case No. 87, declaring that Section 666 of Title 43 of the United States Code is an all-inclusive statutory provision that subjects to general adjudication in state proceedings, all rights of the United States to water within a particular state's jurisdiction, regardless of how they were acquired. Therein specific reference was made to this Court's decree in *Arizona v. California, supra*, with the Court expressly stating that "In *Arizona v. California* we were primarily concerned with Indian reservations." Nevertheless, at no place in the decision pertaining to Eagle River is there any distinction drawn between the entitlement of the United States and the Indian entitlement vested in the United States as trustee thereof, the latter being "private" as opposed to public in character. The Indian rights are distinct and separate from those rights claimed and administered by the agencies of the Forest Service and the Bureau of Land Management alluded to in the said Eagle River case. In other words, it is submitted that there has been a shocking failure by the United States as trustee for the Indians, to distinguish or to indeed even make any reference to the private rights of the Fort Mojave Indians, or any other Indians similarly situated, in the said Eagle River case. The validity of this conclusion is completely and forcefully documented in our Appendix B.

This failure is all pervasive, and is exemplified by a quotation from the Petition of Certiorari in Water Di-

vision No. 5 Case 812 (companion case to Eagle River Case No. 87). Therein it was stated:

"Reserved rights (of the United States) have been defined by this Court as the entitlement of the United States to use as much water from sources on land withdrawn from the Public Domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to the water rights vested as of the date of the withdrawal. *Arizona v. California*, 373 U.S. 546, 595-601." *Petition for Writ of Certiorari** Case No. 87 on page 3.*

The paraphrasing of the decision of *Arizona v. California*, *supra*, as last cited, is truly critical to the Fort Mojave Tribe because most assuredly the Mojave rights are not an "entitlement of the United States to use**" water. Rather, the citation, when considered in context, revealed the Mojaves and other Indians similarly situated have rights to the use of water which have been recognized and distinguished from those of the United States for public purposes.

Again failure to establish the all important difference between the "private" rights of the Indians, held in trust for them by the United States, from those of the Federal Government, held for the public as a whole, is found in this statement from the brief filed with the Supreme Court:

"As indicated previously** the United States unquestionably has the right to use as much water from sources on lands withdrawn from the Public Domain as is necessary to fulfill the purposes for which the lands were withdrawn**".

Not only is the statement incorrect, but it should be noted that the cases cited in the brief to support the

contention relate exclusively to Indian rights as opposed to public rights. These cases are found in the brief for the United States, Case No. 87 on page 10, all of which underscores the imperative need to distinguish the Indian rights from those of the public.

In keeping with the tone and temper of said erroneous excerpt quoted from the Petition of Certiorari and the briefs filed in Case No. 87 is still another excerpt taken from the Petition and paraphrased in the brief to the effect that: "The magnitude of the problem is indicated by the fact that about four hundred forty-three million acres have been withdrawn from the Public Domain for use as Indian reservations, national parks, national forest, national recreation areas, national manuments, etc." Petition for Certiorari** on pages 10-11. Failure to separate and distinguish the real property rights of the American Indians from the public rights evidences the unfair and incorrect position which the United States has presented to the Supreme Court in regard to the private interests of the Indian which is potently spelled out and detailed in said Appendix B. From the legal standpoint this presents an intolerable situation for the Fort Mojave Indian Tribe and for all other American Indians whose rights to use of water are in effect intermingled with the "reserve" rights of the United States to the use of water for the public at large.

It is respectfully submitted that perhaps a fatal blow to the Indian interests was, we believe, inadvertently delivered by Justice Douglas when he also failed to distinguish the Indian real property interests in his decision of March 24, 1971, in the Eagle River Case No. 87. Therein he stated:

"As we said in *Arizona v. California*, 373 U.S. 546, the Federal Government had the authority both before and after a State is admitted into the Union 'to reserve waters for the use and benefit of federally reserved lands.' *Id.*, at 597. The federally reserved lands include any federal enclave. In *Arizona v. California* we were primarily concerned with Indian Reservations. *Id.*, 598-601. The reservation of waters may be only implied and their amount will reflect the nature of the federal enclave. *Id.*, 600-601."

It cannot be denied that this quoted statement of Justice Douglas fails to distinguish the private Indian rights involved from the public rights of the United States. It must also be admitted that one can reasonably conclude therefrom that the private Indian rights will henceforth be governed by this Court's holding therein that state courts have jurisdiction to adjudicate the reserved water rights of the United States. Furthermore it should be observed that this court made its decision herein without distinguishing the Indian Rights despite a clear declaration by the Congress of the United States that no state shall have jurisdiction "to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of" property still held in trust by the United States for Indians, and that Congress expressly included water rights therein. Public Law 280 (67 Stat. 589, 28 U.S.C. Sec. 1360(b)).

The gravest consequence to the Fort Mojave Tribe of Indians will necessarily ensue by the failure of the petitions for certiorari and the brief in Eagle River Case No. 87 to point out to the Supreme Court that the waiver of sovereign immunity from suit under 43 U.S.C. 666 does not in any way pertain to Indian

rights nor to their use of water. It is basic law that unless the Indian immunity from suit is specifically waived by the Congress that immunity is unimpaired. From the language of 43 U.S.C. 666, it is manifestly clear that the Congress did not intend to include the rights of the American Indians within the scope of that waiver. If construction of the Act were permissible, which is denied, the legislative history would result in the rejection of any concept as to the applicability of the Act to the Indian rights and interests. This failure to distinguish the Indian rights from the public rights of the United States government could therefore result in subjecting the rights of the American Indians to adjudication thereof under the laws of the states. Because the state laws governing the rights of the use of water are frequently incompatible with the laws governing the Indian rights to the use of water, the extreme prejudice to the Indian rights becomes patently clear. In short, the repeated failure of the Federal government, as trustee for the Indians, to bring to the Supreme Court's attention the significant disparity between the laws governing Indian rights and the laws governing the public rights of the United States, could result in serious impairment or extinguishment of the Indian rights. Thus, failure to clarify this in Eagle River Case No. 87 sufficiently muddies the waters so that it is not an over statement to declare that the Indian real property rights, to a large extent, might be seriously infringed upon or completely extinguished.

WHEREFORE, the Fort Mojave Tribe of Indians respectfully represent:

I.

That the Fort Mojave Tribe of Indians is a necessary and indispensable party to this action but they cannot be made parties thereto since Congressional consent therefore has not been granted, and no order, judgment or other action of this court could or would be effective against the Fort Mojave Tribe of Indians or any other Indians similarly situated.

II.

That this Court is without jurisdiction in the premises, and that this Court's decision of March 24, 1971, in Eagle River Case No. 87, should therefore be vacated and a dismissal of the action ordered *sua sponte* due to lack of jurisdiction.

RAYMOND C. SIMPSON,
Tribal Attorney.

MEMORANDUM OF POINTS AND AUTHORITIES.

In the early landmark case of *Worcester v. Georgia*, 6 Pet. 515, 31 U.S. 515, Chief Justice Marshall declared in unequivocal language that Indian tribes are distinct political entities with the right of self-government, having exclusive authority within their territorial boundaries and that they are not subject to the laws of the states in which they might be located. The broad principles of the said *Worcester* decision have been adhered to by the courts ever since, and were reaffirmed by this Honorable Court as late as *Williams v. Lee*, 358 U.S. 217, 79 S. Ct. 269.

The Fort Mojave Indian Reservation is geographically located in the States of Arizona, California, and Nevada with the mainstream of the Colorado River running directly through it. All three of said States have from time to time attempted to impose their laws upon the Fort Mojave Tribe of Indians who, in turn, have resisted by relying upon their legal rights as described in the *Worcester* case. In 1953 the picture of state encroachment was displayed before the Congress of the United States with the accompanying argument that "law and order" required that the respective states be granted a limited jurisdiction. Congress agreed and proceeded to pass Public Law 280 (28 U.S.C. 1360) for that limited purpose, but was emphatic in Section 1360(b) thereof that real property rights, including land and water, still held in trust by the United States for the benefit of Indians, did not become subject to the jurisdiction of any state or its political subdivisions. Hence, when this Court, in rendering its decision in *Eagle River Case No. 87*, held that the State of Colorado had jurisdiction to adjudicate the reserved rights of the United States, it was acting contrary to Con-

gressional mandate unless it is made clear that said decision is in no way applicable to the privately owned property rights of the Indians, held in trust by the United States.

I.

A Suggestion of Interest is the accepted method of bringing to the attention of the Court the interest of an entity such as an Indian tribe in the subject matter of a suit, and the Court's lack of jurisdiction of any suit designed to circumscribe, limit and affect such an entity in the use and enjoyment of its property or property rights.

Calnevari Corporation v. River Farms, Inc., No. 62-361-K Civil, United States District Court, So. Distr. of Calif., Central Division (1965);

Stanley v. Schwalby, 147 U.S. 508 (1893);

Florida v. Georgia, 58 U.S. 478 (1854);

Calhoun County, Fla. v. Roberts, 137 F. 2d 130 (C.A. 5, 1943);

Booth v. Fletcher, 101 F. 2d 676, (C.A. D.C. 1939);

Barron & Holtzoff (Wright); Federal Practice and Procedure Section 352.

II.

A suggestion of interest by the Fort Mojave Tribe of Indians showing an interest in water rights by way of reference to a decree of this Honorable Court granting them specific water rights, or to an Act of Congress prohibiting State adjudication thereof, should be sufficient to show that they are an indispensable party.

When a question of the District Court's jurisdiction is raised, either by a party or by the Court

on its own motion, the Court may inquire by affidavits or otherwise, into the facts as they exist.

F.R.C.P. Rule 12(b);

1360(b) Title 28 of the U.S. Code states:

"Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, *including water rights*, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; *or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.*" (Emphasis ours).

Wetmore v. Rymer, 169 U.S. 115, 120-121;

McNutt v. General Motors Corp., 298 U.S. 178;

KVGS, Inc. v. Associated Press, 299 U.S. 269.

III.

The Indians are indispensable parties in any case involving property in which they have an interest.

Maricopa County v. Valley Bank, 318 U.S. 357 (1943);

United States v. Alabama, 313 U.S. 274 (1941);

Minnesota v. United States, 305 U.S. 382 (1939);

Arizona v. California, 298 U.S. 558 (1936).

IV.

The title or property interest of the Fort Mojave Indian Tribe is put in issue when an Indian Tribe claims an interest.

Louisiana v. Garfield, 211 U.S. 70;

Stanley v. Schwalby, 162 U.S. 255;

Oregon v. Hitchcock, 202 U.S. 60;

Goldberg v. Daniels, 231 U.S. 218.

V.

Indian Tribes under the tutelage of the United States are not subject to suit without the consent of Congress, and Congress alone can authorize such a suit.

Thebo v. Choctaw Tribe of Indians, 66 Fed. 372 (1895) wherein the Court said:

"It may be conceded that it would be competent for Congress to authorize suit to be brought against the Choctaw Nation upon any and all the causes of action in any court it might designate. Acts of Congress have been passed, specially conferring on the courts therein named jurisdiction over all controversies arising between the railroad companies authorized to construct their roads through the Indian Territory and the Choctaw Nation and the other nations and tribes of Indians owning lands in the territory through which the railroads might be constructed. Other acts have been passed authorizing suits to be brought by or against these Indian Nations in the Indian Territory to settle controversies between them and the United States and between themselves.

Among such acts are the following: 'An act for the ascertainment of amount due the Choctaw Nation.' 21 Stat. 504. Act of July 4, 1884 (23

Stat. 73), granting the right of way through the Indian Territory to the Southern Kansas Railway Company. An act granting right of way through Indian Territory to Kansas & Arkansas Valley Railway Company, 24 Stat. 73. An act granting the right of way through the Indian Territory to the Kansas City, Ft. Scott & Gulf Railway Company. Id. 124. An act granting the right of way through Indian Territory to Ft. Worth & Denver City Railway Company. Id. 419. An act granting the right of way through Indian Territory to the Chicago, Kansas & Nebraska Railway Company. Id. 446. An act granting right of way through the Indian Territory to the Choctaw Coal & Railway Company. 25 Stat. 35. An act granting the right of way to the Ft. Smith & El Paso Railway Company through the Indian Territory. Id. 162. An act granting the right of way to Kansas City & Pacific Railway Company through the Indian Territory. Id. 140. An act granting the right of way to Paris, Choctaw & Little Rock Railway Company through the Indian Territory. Id. 205. An act granting right of way to Ft. Smith, Paris & Dardanelle Railway Company through Indian Territory. Id. 745. An act to authorize the Kansas & Arkansas Valley Railway Company to construct an additional railroad through the Indian Territory. 26 Stat. 783.

The constitutional competency of Congress to pass such acts has never been questioned, but no court has ever presumed to take jurisdiction of a cause against any of the five civilized Nations in the Indian Territory in the absence of an act of congress expressly conferring the jurisdiction in the particular case (pp. 373-374).

Being a domestic and dependent state, the United States may authorize suit to be brought against it. But, for obvious reasons, this power has been sparingly exercised. It has been the settled policy of the United States not to authorize such suits except in a few cases, where the subject matter of the controversy was particularly specified, and was of such a nature that the public interests, as well as the interests of the Nation, seemed to require the exercise of the jurisdiction. It has been the policy of the United States to place and maintain the Choctaw Nation and the other civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states. A state, without its consent, cannot be sued by an individual. 'It is a well-established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts or any other without its consent and permission; but it may if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals or by another state.' *Beers v. Arkansas*, 20 How. 527. The United States has waived its privilege in this regard, and allowed suits to be brought against it in a few specified cases. Some of the states of the Union have at times claimed no immunity from suits, but experience soon demonstrated this to be an unwise and extremely injurious policy, and most, if not all of the states after a brief experience, abandoned it, and refused to submit themselves to the coercive process of judicial tribunals. When the Supreme Court of the United States in *Chisholm v. Georgia*, 2 Dall. 419, decided that under the

constitution the court had original jurisdiction of a suit by a citizen of one state against another state, the eleventh amendment to the constitution was straightway adopted, taking away this jurisdiction. Since the adoption of this amendment, the contract of a state 'is substantially without sanction, except that which arises out of the honor and good faith of the state itself; and these are not subject to coercion'. In *re Ayers*, 123 U.S. 443, 505, 8 Sup. Ct. 164. One claiming to be creditor of a state is remitted to the justice of its legislature. It has been the settled policy of Congress not to sanction suits generally against these Indian Nations or subject them to suits upon contracts or other causes of action at the instance of private parties. In respect to their liability to be sued by individuals, except in the few cases we have mentioned, they have been placed by the United States, substantially, on the plane occupied by the States under the eleventh amendment to the constitution. The civilized Nations in the Indian Territory are probably better guarded against oppression from this source than the states themselves, for the states may consent to be sued, but the United States has never given its permission that these Indian Nations might be sued generally, even with their consent. As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it. The intention of Congress to confer such a jurisdiction upon any court would have to be expressed in plain and unambiguous terms (pp. 375-376)."

Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F. 2d 529;
Haile v. Saunooke, 148 Fed. Supp. 604, Aff'd.
246 F. 2d 293, Cert. denied 78 S. Ct. 268
(1957).

VI.

Indian Tribes may not be sued without their consent thereto, and this proceeding should be dismissed *sua sponte* since the Mojave Indians are an indispensable party who were never joined, and who do not consent to be sued.

Turner v. United States, 248 U.S. 354 (1919);
United States v. U.S. Fidelity & Guar. Co., 106
F. 2d 804 (1939), 309 U.S. 506 (1940).

See also

United States v. McShan v. Sherrill, 283 F. 2d
462 (1960);
Partan, et al., 132 F. 2d 886 (1943), on the
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United States v. Sherwood, 312 U.S. 584
(1941);
United States v. Shaw, 309 U.S. 495 (1940);
Minnesota v. United States, 305 U.S. 382
(1939).

VII.

There can be no waiver of an Indian tribe's immunity from suit. This proposition of law was quite graphically illustrated in *United States v. United States Fidelity & Guaranty Co.*, 60 S. Ct. 653, at 657, 309 U.S. 506 at 514, wherein the Court said:

"The reasons for the conclusion that this immunity may not be waived govern likewise the question of *res judicata*. As no appeal was taken from this Missouri judgment, it is subject to collateral at-

tack only if void. It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give policy to this exercise of judicial power. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body."

It is clearly apparent that in the instant case the Fort Mojave Indian Tribe must be deemed an indispensable party; that they have not consented to be sued, and that this Court's decision of March 24, 1971, in the Eagle River Case No. 87 should therefore be vacated and a dismissal of the action ordered *sua sponte* by reason of lack of jurisdiction.

RAYMOND C. SIMPSON

Tribal Attorney.

The hereinafter named Indian Tribes represented by Raymond C. Simpson also concur with the Fort Mojave Indian Tribe and do hereby join them in this proceeding on behalf of themselves and all other Indian tribes who may be similarly situated.

The Agua Caliente Band of Mission Indians at Palm Springs, California.

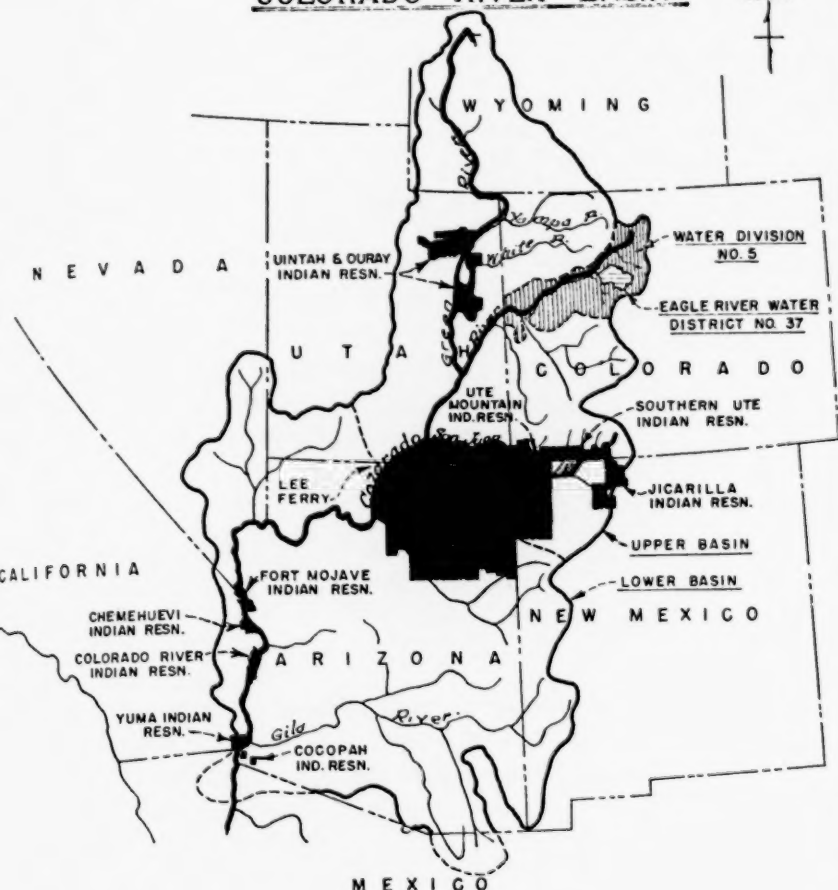
The Cabazon Band of Mission Indians at Indio, California.

The Quechan Indian Tribe at Yuma.

APPENDIX A.

COLORADO RIVER BASIN

NORTH



Map of The

COLORADO RIVER BASIN

ARIZONA V. CALIFORNIA [373 US 602]

TO WHICH THERE IS ADDED

THE EAGLE RIVER WATER DISTRICT NO. 37

COLORADO WATER DIVISION NO. 5

AND INDIAN RESERVATIONS ON THE MAIN STEM
OF THE COLORADO RIVER, THE GREEN RIVER AND
THE SAN JUAN RIVER AND THEIR TRIBUTARIES.

APPENDIX B.

United States Department of the Interior
Bureau of Indian Affairs
Washington, D.C. 20242

CONFLICTS OF INTEREST IN PROCEEDINGS BEFORE THE SUPREME COURT OF THE UNITED STATES

* * * * *

A PREFACE TO DISASTER FOR THE AMERICAN INDIAN PEOPLE

William H. Veeder

* * * * *

**On Certiorari to the Supreme Court of the State of Colorado
Eagle River Adjudication, October Term, 1970, No. 87
Water Division No. 5 Adjudication, October Term, 1970,
No. 812**

March 23, 1971

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**CONFLICTS OF INTEREST
IN PROCEEDINGS BEFORE
THE SUPREME COURT OF THE
UNITED STATES**

* * * * *

**A PREFACE TO DISASTER FOR THE
AMERICAN INDIAN PEOPLE**

SUMMARY

(a) Presidential condemnation of Justice department's "inherent conflict of interest" respecting American Indians: "No self-respecting law firm would ever allow itself to represent two opposing clients in one dispute; yet the Federal government has frequently found itself in precisely that position. * * * the Indians are the losers when such situations arise * * * the credibility of the Federal government is damaged whenever it appears that such a conflict of interest exists." That inherent conflict of interest within the Justice Department respecting the American Indian rights to the use of water both as to law and fact, is all-pervasive in the Adjudications to which this consideration pertains.

(b) American Indians have direct, immediate and inextricable interests in the *Eagle River and Water Division No. 5 Adjudications* before the Supreme Court by reason of the

1. subject matter of the litigation—rights to the use of water in the main stream of the Colorado River and its tributaries within the State of Colorado;

2. erroneous definition used by the Justice Department of the term "Reserved rights" to the use of water and the authorities cited by it;

3. almost total reliance by the Justice Department upon Indian law respecting rights to the use of water, while denying Indian interest in the proceedings;

4. precedents which must reasonably be expected from any decision of the Court.

(c) American Indian interest, in addition to those expressed in (b) above include: (1) the expressed willingness to subject the Federally owned rights to the use of water to the State police regulations pertaining to the jurisdiction, adjudication, administration and control of those rights; (2) an apparent willingness to submit the United States to the police regulations on a Statewide basis in regard to the jurisdiction, adjudication, control and administration of rights to the use of water allegedly pursuant to 43 U.S.C. 666, of seven States in the Colorado River Basin alone.

(d) Refusal of the Justice Department to distinguish between Indian private rights to the use of water which are held in trust for the Indians by the United States, and the public rights of the United States—rather including them in definition of “Reserved rights” of the United States—threatens all Indian rights to the use of water by reason of Colorado’s Supreme Court ruling, on review before the Supreme Court of the United States, that 43 U.S.C. 666 subjected “Reserved rights” to State police power, State court jurisdiction for adjudication, control and administration.

(e) Specific American Indian Reservations with rights to the use of water in the main stream of the

Colorado River and its tributaries within the State of Colorado:

(1) Supreme Court decreed rights in the main stream of the Colorado and its tributaries:

Fort Mojave, Fort Yuma, Colorado River, Chemehuevi, and Cocopah Reservations.

(2) Reservations within the State of Colorado with treaty rights to the use of water in the San Juan River and its tributaries:

Southern Ute and Ute Mountain Reservations.

(3) Reservations outside of Colorado with rights to the use of water in the San Juan River and its tributaries within that State:

(i) Navajo Indian Reservation—Treaty rights;

Jicarilla Apache Indian Reservation—Executive Order rights (In States of New Mexico, Arizona, Utah).

(ii) Uintah and Ouray Reservation—Treaty rights in Green River and its tributaries; White River and its tributaries within the State of Colorado (In State of Utah).

(Note: Rights of individual Indian Reservations except those decreed by the Supreme Court require separate analysis and presentation)

(f) *Winters Doctrine* American Indian rights to the use of water, interests in real property of highest dignity—private in nature held in trust by the United States for the Indians—for the use of the Indians, not the United States:

(1) Immemorial Indian rights to the use of water—title now resides and at all times resided,

in Indians—were not conveyed to the United States—include rights retained by Treaty, by agreement with the United States or otherwise.

(2) Invested rights to the use of water—title originally in Indians, extinguished by the United States, retransferred to the Indians by Executive Order of Congressional action.

(g) Erroneous definition by Justice Department of "Reserved rights" presented to the Supreme Court, if adopted by the Supreme Court, is tantamount to confiscation of American Indian rights not only in the Colorado River Basin but throughout the United States.

(h) Invasion and threatened invasion of Indian rights to the use of water:

(1) Colorado River and its tributaries vastly over-appropriated with the river yielding far less than originally estimated.

(2) Pollution of Colorado River stemming primarily from over-appropriation.

(3) Central Arizona Project being constructed in total disregard of wholly insufficient water supply for the project and present severely polluted character of Colorado River.

(4) Western U.S. Water Plan—A design for destruction of American Indian Reservations as viable communities.

(i) Denigration by Justice Department of title of American Indian rights before the Supreme Court.

(1) Inherent conflict of interest of Justice Department exemplified in *Eagle River Adjudication* and *Water Division No. 5 Adjudication*—the same Assistant Attorney General purports to defend

Indian titles while strenuously advocating against Indian titles in claims by Indians for compensation for seizure of their titles—explains erroneous definition of "Reserved rights" of United States allegedly supported by Indian law.

(2) Inherent conflict of interest of Justice Department in representing Federal agencies which claim adversely to Indians while it purports to represent Indians.

(j) Failure of Justice Department respecting its interpretation of 43 U.S.C. 666, properly and adequately to represent American Indians before the Supreme Court generally or in *Eagle River Adjudication* and *Water Division No. 5 Adjudication*:

(1) Failure to assert American Indian Tribes immune from suit and that Congress has not waived their immunity from suit as it pertains to Indian rights to the use of water by 43 U.S.C. 666 or otherwise.

(2) Failure of Justice Department to rely upon or refer to Federal Decree which must control, embracing entire drainage of the Colorado River within the State of Colorado—area virtually identical to that within *Water Division No. 5 Adjudication* including *Eagle River Adjudication*.

(3) Failure of Justice Department to deny applicability of 43 U.S.C. 666 on grounds it does not and could not have retrospective operation.

(4) Failure of Justice Department to object to proceedings under 43 U.S.C. 666 by reason of fact United States is not a "necessary" party as required by Congress; there is no case, no conflict, no controversy, no justiciable issue before the Supreme Court or the courts below.

[Seal]

United States Department of the Interior
Bureau of Indian Affairs
Washington, D.C. 20242

CONFLICTS OF INTEREST
IN PROCEEDINGS BEFORE
THE SUPREME COURT OF THE
UNITED STATES

* * * * *

A PREFACE TO DISASTER FOR THE
AMERICAN INDIAN PEOPLE

William H. Veeder

* * * * *

ON CERTIORARI TO THE SUPREME COURT
OF THE STATE OF COLORADO

EAGLE RIVER ADJUDICATION,
OCTOBER TERM 1970, NO. 87
WATER DIVISION NO. 5 ADJUDICATION,
OCTOBER TERM, 1970, NO. 812

PLATE I.

IN THE SUPREME COURT OF THE UNITED STATES
EAGLE RIVER ADJUDICATION, OCTOBER TERM 1970,
NO. 87

WATER DIVISION NO. 5 ADJUDICATION, OCTOBER
TERM, 1970, NO. 812

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF COLORADO

INDIAN RESERVATIONS ON THE MAINSTREAM OF
THE COLORADO RIVER WITH DECREED RIGHTS
IN *ARIZONA V. CALIFORNIA* (373 U.S. 546, 596; 376
U.S. 340, 345).

RESERVATION

DECREED RIGHTS
ANNUAL Ac. Ft.
DECREED
ACREAGE

CHEMEHUEVI	11,340	1,900
COCOPAH	2,744	431
YUMA	51,616	7,743
COLORADO RIVER	717,148	107,588
FORT MOJAVE	122,648	18,974
TOTALS	905,496 Ac. Ft.	136,636 Ac.

INDIAN RESERVATIONS DIRECTLY INVOLVED IN
ADJUDICATIONS SHOWN ON FACING MAP

STATE OF COLORADO
UTE MOUNTAIN INDIAN RESERVATION
SOUTHERN UTE INDIAN RESERVATION
STATES OF ARIZONA, NEW MEXICO, UTAH
NAVAJO INDIAN RESERVATION
JICARILLA INDIAN RESERVATION
UINTAH AND OURAY INDIAN RESERVATION

COLORADO RIVER BASIN



Map of The

COLORADO RIVER BASIN

ARIZONA V. CALIFORNIA [373 US 602]

TO WHICH THERE IS ADDED

THE EAGLE RIVER WATER DISTRICT NO. 37

COLORADO WATER DIVISION NO. 5

AND INDIAN RESERVATIONS ON THE MAIN STEM
OF THE COLORADO RIVER, THE GREEN RIVER AND
THE SAN JUAN RIVER AND THEIR TRIBUTARIES.

[Seal]

UNITED STATES DEPARTMENT
OF THE INTERIOR

Bureau of Indian Affairs
Washington, D.C. 20242

CONFLICTS OF INTEREST
IN PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE UNITED STATES

A PREFACE TO DISASTER FOR THE
AMERICAN INDIAN PEOPLE

STATEMENT

- (a) *America Indians have direct, immediate and indispensable interests in the Eagle River Adjudication and Water Division No. 5 Adjudication*

American Indians have direct and immediate interests in the subject matter of the *Eagle River Adjudication* and the *Water Division No. 5 Adjudication*¹ now pending before the Supreme Court. Those two adjudications before the Supreme Court are on writs of certiorari to the Supreme Court of Colorado from a decision rendered by that court.² That decision of Colo-

¹*Eagle River Adjudication*: United States, Petitioner v. The District Court In And For The County Of Eagle And State Of Colorado, No. 87, October Term, 1970.

Water Division No. 5 Adjudication: United States of America, Petitioner v. The District Court In And For Water Division No. 5, State of Colorado, and the Judge Thereof, The Honorable Clifford H. Darrow, And The Water Referee Thereof, No. 812, October Term, 1970.

²APPENDIX, pages 12 et seq.; United States of America, Petitioner v. The District Court * * * County of Eagle * * * State of Colorado, et al., Colo.; 458 P.2d 760 (En Banc 1969).

rado's highest court held in effect that the Congress of the United States by an Act³ subsequently to be reviewed in detail, had subjected the rights to the use of water of the United States in the main stream of the Colorado River and the tributaries of that stream within the State of Colorado, to the jurisdiction of the State courts of Colorado for adjudication, control and administration.⁴

- (b) *There is no justiciable issue before the Supreme Court; United States is not a necessary party to adjudications; sua sponte dismissal should ensue by the Court; failure to dismiss creates grave threat to American Indians' rights to the use of water; Justice Department's cryptic and erroneous denial of Indian interests*

Truncated facts before the Supreme Court are infinitely simple. That circumstance prevails in regard to both of the adjudications. *Water Division No. 5* embraces all of the Colorado River drainage and its tributaries within the State of Colorado including the area encompassed within the *Eagle River Adjudication*. Hence reference will first be made to that adjudication.

(1) *Water Division No. 5 Adjudication*⁵

There is a grave paucity of facts before the Supreme Court in regard to the *Water Division No. 5 Adjudi-*

³APPENDIX, page 1, 43 U.S.C. 666.

⁴APPENDIX, page 13.

⁵*Water Division No. 5 Adjudication*: Justice Department recites that on February 11, 1970, a notice pursuant to the Colorado law was received by the Attorney General of the United States. Accompanying the notice was a résumé of recent applications to appropriate rights to the use of water in Water Division 5. The Attorney General was advised if he opposed the ap-

cation. There are no pleadings; no claims of rights; no assertion of conflicting claims; no case or controversy; no justiciable issue appears in the records before the Court for review. Doubt must be expressed from the status of the records in regard to the parties, if any, before the Supreme Court. It is stated in the Justice Department brief "We rely primarily on our brief submitted in *Eagle County* * * * No. 87, this Term * * *." Nevertheless only one of the Respondents in the *Eagle River Adjudication* filed a brief in *Water Division No. 5 Adjudication*.

(2) *Eagle River Adjudication*.⁶

As observed below, the runoff of the Eagle River annually entering the Colorado River far exceeds pres-

plications he should file "a verified statement of opposition." (Appendix, pp. 47 et seq.) In denying a motion to quash service (43 U.S.C. 66) filed by the Justice Department, the trial court stated it was bound by the above mentioned Colorado Supreme Court decision. (Appendix, pp. 50-51) That last mentioned court, based on its decision, denied a Justice Department Petition for a Writ of Prohibition. (Appendix, p. 52) The Justice Department brief in this adjudication to the Supreme Court incorporates by reference much of the *Eagle River Adjudication*. (Appendix, pp. 76, 78 et seq.) Only one of the Respondents from the *Eagle River Adjudication* filed a final brief in this adjudication. It was available for consideration February 16, 1971. (Appendix, pp. 86 et seq.)

⁶*Eagle River Adjudication*: Notice of Supplemental Proceedings of the *Eagle River Adjudication* was served upon the Attorney General; a Justice Department Motion to Dismiss for want of jurisdiction was denied (43 U.S.C. 666) (See APPENDIX, p. 1); a Justice Department Petition for a Writ of Prohibition to the Supreme Court of Colorado was denied by its above mentioned decision declaring the Colorado State court had jurisdiction of the rights of the United States. (Appendix, pp. 10 et seq., 12 et seq.) A Justice Department Petition to the Supreme Court for Certiorari to the Supreme Court of Colorado was granted. (Appendix, p. 19) Respondents describe the Eagle River as a substantial tributary of the Colorado River. Its annual runoff, say Respondents, after all depletions is "408,000 acre feet" entering the Colorado. (Appendix, p. 24 footnote 3). In contrast

(This footnote is continued on the next page)

ent uses. There is not a scintilla of evidence before the Supreme Court that now or ever will there be a conflict between the claims of the National Government, in the light of the huge available supply of water, with any other claims.

From the records, as stated, there are no conflicting rights, no pleadings indicating a conflict with the United States, no case or controversy, no justiciable issue to be resolved by the Supreme Court. Similar to the *Water Division No. 5 Adjudication*, the matter on review is moot. That status of the *Eagle River Adjudication* is not changed by the Justice Department's request, wholly without justification, for an advisory opinion by the Court.

Sua sponte dismissal by the Supreme Court on the basis of the records in these two adjudications should ensue. The United States is not a necessary party to either adjudication, all as will be fully reviewed.

(3) *Requests to Justice Department to advise Court of Indian interests in the Colorado River and tributaries within Colorado*

For many months the Justice Department has been aware of the vital interests of the American Indians

to the large unused annual runoff, claims of the United States are minuscule and from the record are not asserted to be in conflict with any one. (Appendix, pages 8 et seq.) A Respondent asserts an illusory, unperfected, inchoate 1966 paper claim in the Eagle River without asserting any means of perfecting that illusory paper claim (indeed, there is no indication it is empowered by law to develop the project) or any conflict with the United States which would make it a necessary party. (Appendix, p. 7) Other Respondents do not assert claims, only most vague references without alleging any conflict with the United States. (Appendix, p. 24, footnote 5).

An advisory opinion is sought to "reaffirm" principles of law unannounced only sixty years ago and recently "reaffirmed" by the Supreme Court, primarily in regard to Indian rights. (Appendix, pp. 22 et seq.)

in the *Eagle River Adjudication* and the *Water Division No. 5 Adjudication*. The Agua Caliente Band of Mission Indians at Palm Springs, California, on October 21, 1970, through their attorney, advised the Solicitor General of the perilous course, from the Indians' standpoint, that the Justice Department was following. Other Indians, for example, the Fort Mojave Tribe, likewise made demands upon the Solicitor General, asking that he bring to the Court's attention their vital interests. Other outstanding lawyers representing numerous tribal interests, joined in the request to the Solicitor General. Acknowledgment of the Agua Caliente and Fort Mojave interests by the Solicitor General is now a matter of record. There was also extended testimony presented to the Subcommittee on Indian Affairs in regard to the direct interests of the American Indians in the *Eagle River Adjudication*.⁷

On November 6, 1970, the Solicitor General advised the Indian Tribes, "Please be assured that the government intends to make the Supreme Court fully aware of its obligations as trustee of Indian rights in this matter, and of any bearing that the decision may have on those rights." As suggested in the letter from which the quoted excerpt is taken, the Attorney for the Agua Calientes and the Fort Mojave Tribe on November 28, 1970, reviewed and documented in detail the Indian interests in the *Eagle River Adjudication*.⁸ At that time the Petition for Certiorari in *Water Division No. 5 Adjudication* had not been granted.)

⁷APPENDIX, pages 53, 54-57; 59-75; 85; 40 et seq.

⁸APPENDIX, pages 63 et seq.; See also APPENDIX, page 73 in which Attorneys for the Arapahoe Tribe in Wyoming, Salish and Kootenai Tribes in Montana, Hoopa Valley Tribe in California, Quinault Tribe in Washington, Tribes in North Dakota, and the National Congress of American Indians, expressed their grave concern over the posture of that case.

(4) *Violation of assurance to Indians—Cryptic denial to Supreme Court by Justice Department of Indian interests*

January 14, 1971, is the date the Justice Department filed its brief in Water Division No. 5 Adjudication, in which it was to assert to the Supreme Court Indian rights and interests. It accorded to the Indians this cryptic footnote:

"To the best of our knowledge, none of the reserved water rights claimed the the United States in Water Division No. 5 relate to Indian lands,"⁹

That statement on its face is without meaning. Quite obviously rights to the use of water claimed for Forest Service and other lands withdrawn by the United States for the public at large would not "relate to Indian lands," which are private in character held in trust for the American Indians.¹⁰ That the footnote falls far short of reasonable action by the agents of the Trustee United States is abundantly manifest, all as will be reviewed in detail. The facts reviewed in this phase of the consideration gave rise to the request for this analysis and the authorization for it.¹¹

⁹APPENDIX, pages 76, 79, footnote 3—continuation from above quote— "In the event of this Court should rule that 43 U.S.C. 666 subjects federal reserved rights in general to state adjudication, there would remain the further question (not presented by this case) whether the consent statute covers water rights held by the United States in trust for specific Indian tribes—frequently pursuant to treaty—rather than for the benefit of the general public."

¹⁰See "Legal Principles Respecting American Indian Rights To The Use Of Water In General * * *" and related matters, *infra* pp. 37 et seq.

¹¹See APPENDIX, pages 82, 83, 84, 85.

- (c) *Justice Department conduct of the two adjudications before the Supreme Court and in the courts below threatens the American Indians in the Colorado River Basin and in all Western United States*

Denigration of the principles of law upon which the American Indian rights to the use of water are predicated is only one phase of the crucial aspects of the adjudications in question. Conduct by the Justice Department in those adjudications, if permitted to continue, can be equally devastating to the rights of the American Indians. Reference is made to Plate I attached to this consideration and Plate II which immediately follows this page. Particular reference is made to data set forth on those Plates, including pertinent quoted Colorado statutes, as they will aid in locating the areas involved in the proceedings before the Supreme Court and the Indian interests within the State of Colorado, the main stream of the Colorado River and the tributary streams within that State.¹²

¹²Plates I and II.

PLATE II.

COLORADO STATE WATER DIVISIONS ON FACING MAP INCLUDED IN THE SUPREME COURT OF THE UNITED STATES ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Water Division No. 5 Adjudication, October Term, 1970, No. 812:

Subject matter: Rights to the use of water in *Water Division No. 5 Adjudication*.

"Division 5: Division 5 shall consist of all lands in the State of Colorado in the drainage basins of the Colorado River and all of its tributaries arising within Colorado, with the exception of the Gunnison river; but for the purpose of sections 148-21-10 and 148-21-11 of this article the White river drainage basin shall be deemed a part of division 5." (Vol. 11 Colo. Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-8(6))

Eagle River Adjudication, October Term, 1970, No. 87:

Subject matter: Rights to the use of water in *Eagle River Adjudication*.

"The Eagle River is a substantial tributary of the Colorado River in Colorado. The mainstream is about 65 miles in length, and of numerous tributaries, some 17 totalling an additional 180 miles may be considered major water producers. The system drains 950 square miles and delivers to its confluence with the Colorado River an annual average of about 408,000 acre feet of water after all present upstream depletions." (APPENDIX Page 24, footnote 3)

COLORADO STATE COURT PROCEEDINGS IMMEDIATELY INVOLVED BUT NOT DIRECTLY BEFORE THE SUPREME COURT:

"In addition, the Attorney General received similar résumé of applications filed in Water Divisions 4 and 6 during the month of December 1969." (Justice Department Brief, APPENDIX Page 48)

"Division 4: Division 4 shall consist of all lands in the state of Colorado in the drainage basins of the Gunnison river and all of its tributaries, the Little Dolores river, the San Miguel river, and that portion of the Dolores river and its tributaries north of the north township line of Township 45 North, New Mexico Principal Meridian." (Vol. 11, Colo. Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-8(5))

"Division 6: Except as limited by subsection (6) of this section, division 6 shall consist of all lands in the state of Colorado in the drainage basins of the White river, the Yampa or Bear river, the Green river, the North Platte river, and all of their tributaries." (Vol. 11, Colo. Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-8(7))

INDIAN RESERVATIONS WITHIN PURVIEW OF CASES BEFORE SUPREME COURT: SOUTHERN UTE INDIAN RESERVATION; UTE MOUNTAIN INDIAN RESERVATION:

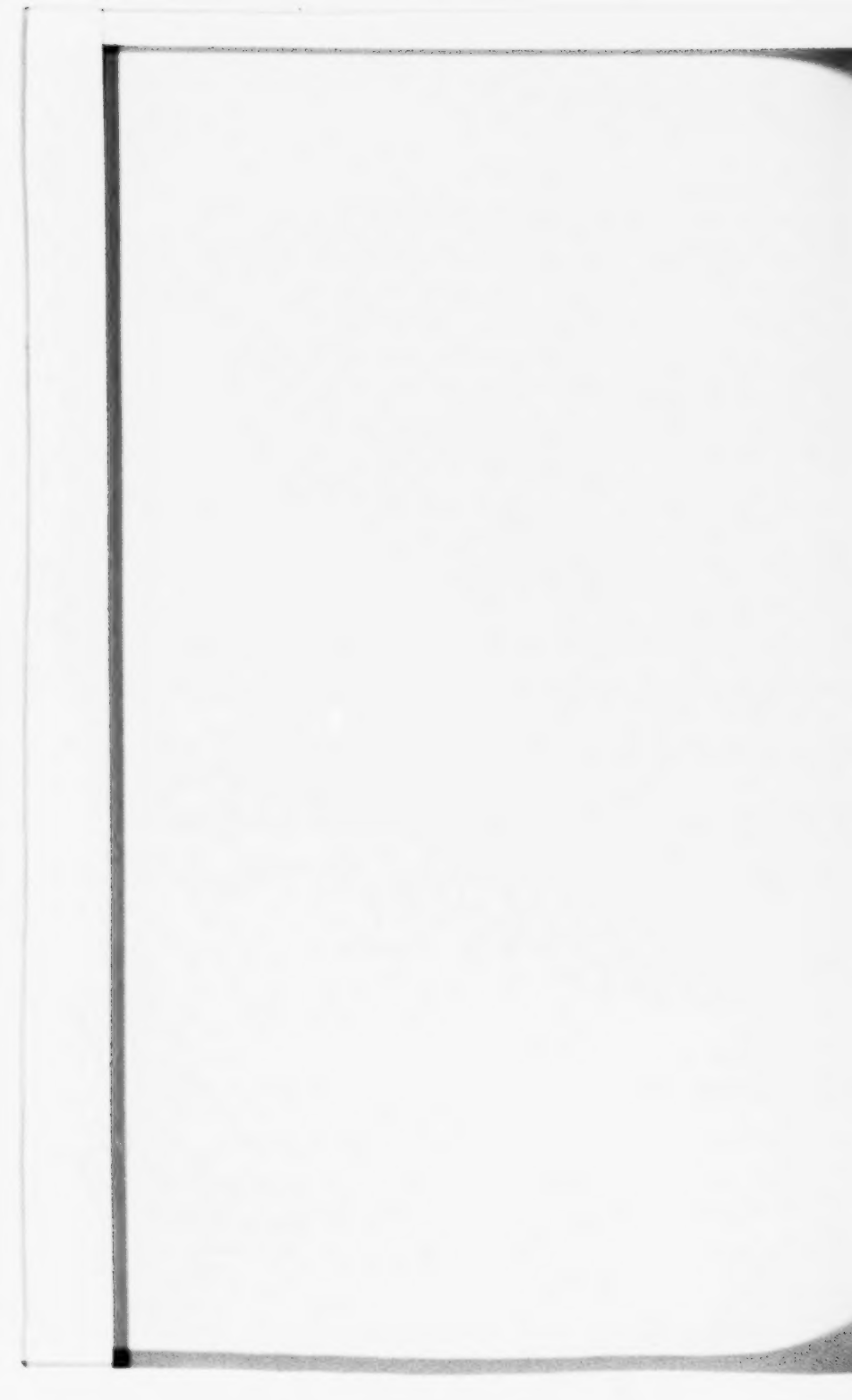
"Division 7: Division 7 shall consist of all lands located in the southwest corner of the state of Colorado and in the drainage basins of the San Juan river, Rio Piedra, Rio Las Animas, Los Pinos river, La Plata river, Rio Mancos and streams tributary to said rivers and creeks as well as that portion of the Dolores river and its tributaries lying south of the north line of Township 45 North, New Mexico Principal Meridian." (Vol. 11, Colo. Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-8(8))



MAP OF A PORTION OF THE
STATE OF COLORADO
AND PORTIONS OF UTAH, ARIZONA AND NEW MEXICO
Showing
COLORADO EAGLE RIVER WATER DISTRICT NO. 37,
COLORADO WATER DIVISION NO. 5
And
CERTAIN OTHER WATER DIVISIONS
And
THE UTE MOUNTAIN, SOUTHERN UTE INDIAN RESERVATIONS,
IN COLORADO, And
INDIAN RESERVATIONS IN UTAH, NEW MEXICO AND ARIZONA

PLATE II

BUREAU OF INDIAN AFFAIRS
PHOENIX AREA OFFICE
J.H. JONES MAR 7, 1971



American Indians' rights and interests are inextricably inter-related to the decision of Colorado's highest court and the two adjudications to which this consideration is directed. Equally important to the American Indians is the course of conduct by the Justice Department in Colorado's courts in which the adjudications were initiated.

(1) Plate I discloses that five Indian Reservations have rights to the use of water in the main stream of the Colorado River and its tributaries within Colorado. Rights in that river are the subject matter of the *Water Division No. 5 Adjudication*;

(2) Plate I also discloses American Indians within Colorado have vested in them title to rights to the use of water;

(3) Plate I also discloses that American Indians have rights to the use of water in the Green River and its tributaries within the State of Colorado and in the San Juan and its tributaries within the State of Colorado—indeed, American Indians have rights in every tributary of the Colorado River which flows out of the State of Colorado;

(4) Due to their vital interests within Colorado, American Indians and Indian Tribes throughout the arid and semiarid West have just cause for gravest concern over the course of conduct of the Justice Department in these adjudications. For example:

(i) Justice Department in error states to the Supreme Court in the *Eagle River Adjudication*: "Reserved rights have been defined by this Court as the entitlement of the *United States to*

use as much water from sources on lands withdrawn from the public domain * * *.”¹³ As presented, that statement, reiterated and repeated throughout the Petitions for Certiorari and briefs filed by the Justice Department, is in total error and gravely trenches upon the principles of Indian law. Throughout the adjudications the Justice Department failed to distinguish between the Indian rights to the use of water which are private in character held in trust by the United States for the Indians, from the “public” rights—for example, those asserted for the Forest Service and Bureau of Land Management in both adjudications on review.¹⁴

(ii) Having failed correctly to state the law to the Supreme Court and to distinguish the American Indian rights held in trust for them by the United States, from the public rights, the Justice Department, without reason or justification, requests the Supreme Court in the pending cases “to reaffirm” the numerous decisions of that Court and others, which preserve and protect the Indians’ rights to the use of water. That request to reaffirm was made thought he principles in question were not challenged in the proceedings giving rise to the review by the Supreme Court.¹⁵

¹³APPENDIX, Pages 1, 2; See *infra*, page 66 “Denigration Before The Supreme Court of the American Indian Rights To The Use of Water * * *.”

¹⁴APPENDIX, pages 1, 2-3; 19, 20-21; See *infra*, page 37, “Legal Principles Respecting American Indian Rights To The Use Of Water In General * * *”, particularly page 61.

¹⁵APPENDIX, pages 19, 22; See *infra* page 66 “Denigration Before The Supreme Court of the American Indian Rights To The Use Of Water * * *.”

(iii) In total disregard of the rights of the Indians in the Colorado River and its tributaries, the Justice Department has offered—albeit cryptically—in clear violation of the American Indian rights to the use of water in the main stream of the Colorado River and its tributaries, voluntarily to “submit itself to the jurisdiction of” the State courts of Colorado for the adjudication, administration and control of its rights within the State of Colorado. Critical nature of that mindless proffer to submit the “reserved rights” of the United States is abundantly manifest when it is recognized that the Justice Department fails throughout the adjudications to distinguish Federal rights from Indian rights.¹⁶

(iv) American Indians’ rights to the use of water are further imperiled by another cryptic announcement to the Colorado courts and to the Supreme Court by the Justice Department. That Department says this in regard to the Act of Congress which Colorado’s Supreme Court has interpreted as submitting all of the rights of the National Government to State court jurisdiction for adjudication, control and administration: “Since the United States has water rights throughout entire river systems, such as

¹⁶APPENDIX, pages 10, 11 second full paragraph, 12, 14, where a proffer was made to Colorado’s highest court. It will be observed that the Colorado Supreme Court declared it had jurisdiction and outlined the *modus operandi* where the “reserved rights”—omitting entirely Indian rights—could be allegedly protected. (See APPENDIX, Pages 16 and 17 on which the breadth of the jurisdiction of Colorado’s district courts is reviewed in some detail).

the Colorado River, it is more likely to be adversely affected by piecemeal adjudications than private parties whose interests are not so widespread.”¹⁷ Continuing to imperil the basin-wide rights of the American Indians, the Justice Department tacitly agrees to subject the rights of the United States—without distinguishing the Indian rights—to the jurisdiction of the State courts of Colorado for adjudication, control and administration. It says this to the Highest Court and to the Colorado courts: “* * * where a river system traverses the boundaries of a single State, the United States should not, we submit, be required to assert its rights in any proceeding that is less than statewide in character.”¹⁸ Reference is made to Plate I in connection with that tacit offer to accept State court control. From that Plate will be observed the Indian Reservations to which that tacit offer made by the Justice Department to submit the United States to jurisdiction, adjudication, control and administration of State law, might well be applicable. Reference is also made to Plate II disclosing the number of rivers in which the Indians have rights to the use of water, which might well come within that wholly unauthorized offer by the Justice Department. That proffer by Justice to compromise the express language of the Congress in the waiver of immunity from suit,¹⁹ should not be accepted by the Indians, or indeed by the United

¹⁷APPENDIX, pages 1, 5, 6, 22-23.

¹⁸APPENDIX, Page 23.

¹⁹APPENDIX, Pages 1, 2.

States, particularly in view of the Supreme Court of Colorado's interpretation of that Congressional Act.²⁰

Tacitly to agree, as does the Justice Department, that the Congress under the circumstances where “* * * the United States has water rights throughout entire river systems, such as the Colorado River, * * *” submitted the Nation's rights to the use of water to State control and administration on those interstate streams, for the reach of the river within each single State, is violative of the language of the statute²¹ and of the cases applying that express language.²² In the analysis of the Indian rights within the State of Colorado itself, on the main stream and tributaries of the Colorado River outside of Colorado, the impact of the Justice Department's departure from the express language of 43 U.S.C. 666 becomes abundantly apparent.

²⁰APPENDIX, Pages 12, 13, 14, 15: “We are not determining whether the United States has reserved rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn.”

²¹APPENDIX, Page 1. “* * * Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source * * *” 43 U.S.C. 666. No power is there vested in the Justice Department to have the Nation's rights in one State subjected to the jurisdiction, control and administration in that one State, in disregard of its rights downstream.

²²APPENDIX, Page 79. *Miller et al. v. Jennings*, 243 F.2d 157, 159 (C.A.5, 1957); *Cert. denied* 355 U.S. 827 (1958); (There the United States District Court for the Western District of Texas declared it was without jurisdiction by reason of the fact it did not have before it all parties having rights in the Rio Grande)—*Dugan v. Rank*, 372 U.S. 609, 617-618 (1963); See 293 F.2d 340.

- (d) *Justice Department's almost total reliance on Indian law, and other conduct in these adjudications inexorably resulted in the Colorado courts, the Respondents, amici curiae, proceeding on the basis that the Indian rights and their precedents respecting those rights are before the Court for review*

Reference will be made to almost total reliance upon Indian law by the Justice Department in its contention respecting the "reserved rights of the United States."²³ Respondents urge—in total error—that the United States must go back to Colorado's State district court for a determination of all claims—including Indian rights: "At least one reason for the need for such a determination is that most and possibly all reserved rights claimed to exist must be implied if they are to be found at all, * * *." Continuing, Respondents refer specifically to Indian rights as follows: "This Court found in *Arizona v. California*, 373 U.S. 546 that the reserved rights claimed for Indian Reservations had to be implied (at 599), as had been the case in *Winters v. United States*."²⁴ In an extensive review Respondents

²³See footnote 172, *infra* p. 73.

²⁴APPENDIX, Pages 24, 26. *Note*: In error the Respondents fail to distinguish between the *Winters Decision* and *Arizona v. California*. In the *Winters Decision* the Indians were grantors under the agreement of May, 1888, to the United States, grantee under that agreement. As the Supreme Court states in *Winters*: "The case, as we view it, turns on the agreement of May, 1888 * * *." (207 U.S. 564, 575-576 (1908)) Though no mention was made in that Indian granting agreement to the United States that the Indians retained rights to the use of water in the Milk River, the Supreme Court nevertheless declares that those rights were retained by the Indians, were not granted. Based on that implied reservation by the Indians for themselves, the Court states the admission by the United States of Montana into the Union did not destroy the rights retained by the Indians.

In *Arizona v. California* the converse was true with the Nation granting to the Indians and reserving for them in the grant,

discuss in detail Indian rights which are, of course, virtually the only rights in the cases cited under the so-called "reservation theory".

Amicus Curiae briefs of States with large Indian populations, relying heavily upon the *Winters Doctrine*, have been filed.²⁵ They include: Colorado, Oregon, Nevada, Idaho, Montana and Alaska,²⁶ Arizona,²⁷ Utah,²⁸ California,²⁹ Oklahoma,³⁰ Washington³¹ and Wyoming.³² Washington and Wyoming in their Amicus Curiae briefs specifically allude to Indian *Winters Doctrine* rights. Complex questions of Indian rights to the use of water are directly and immediately presented in many of the other State briefs.

It is manifest that the Colorado decision before the Supreme Court for review—in error—makes no distinction between Indian rights and the public rights of the Nation.³³

In the light of all the facts and principles of law reviewed above, it is here reiterated that the Justice Department's failure to make the distinction between the private rights of the Indians, held in trust for them by the United States, and the federal public rights

rights to the use of water in the main stream of the Colorado River sufficient to meet the present and future water requirements of those Reservations, to make habitable their lands, all as decreed by the Supreme Court of the United States, 373 U.S. 546, 595-600 (1963). See Plate I.

²⁵APPENDIX, Pages 30 et seq.

²⁶APPENDIX, Page 30.

²⁷APPENDIX, Page 32.

²⁸APPENDIX, Page 35.

²⁹APPENDIX, Page 36.

³⁰APPENDIX, Page 37.

³¹APPENDIX, Page 38.

³²APPENDIX, Page 39.

³³APPENDIX Pages 12, 14, 15, 17.

can only be considered frivolous in the extreme. Failure to make that distinction and thus subject the Indian rights to the threat of State law, control and administration, is a disaster of the first magnitude to the American Indians.

(e) *References to American Indian rights to the use of water in the Colorado River and its tributaries*

Interests of the American Indians in the main stream of the Colorado River and its tributaries are graphically displayed by Plate I as it relates to the issues pending before the Court. That map of the drainage area of the Colorado River should be considered in the light of Colorado's Supreme Court decision now on review. In that State court decision, adhering to the Justice Department concepts as advanced to it and the Supreme Court, no distinction is made between the Indian rights to the use of water held in trust for the benefit of them, and the federal rights for public purposes. With specific reference to *Winters* and other Indian decisions, Colorado's State court under the heading "Reserved Rights" says this:

"*Winters v. United States, supra*, [458 P.2d 770] involved water for an Indian reservation reserved prior to the admission of Montana into the Union. It was argued that the subsequent admission of Montana into the Union 'upon an equal footing with the original States' (25 Stat. 676) repealed the reservation of water. This argument was not accepted. We are not concerned here with water rights asserted by the United States prior to Colorado's admission into the Union.

* * *

"We are not determining whether the United States has reserved water rights in connection with

lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn."³⁴

Two aspects crucial to the Indians are created by that explicit ruling of Colorado's Supreme Court, which the Justice Department—if its cryptic statement means anything³⁵—without success, seeks to ignore: (1) Under Colorado laws Indian rights are within the purview of its statewide statutes and decisions (2) Indian rights are within the nationwide purview of the alleged waiver by the Congress of immunity from suit as the issues are presented in the *Eagle River Adjudication* and *Water Division No. 5 Adjudication*.

- (1) *San Juan River Drainage, State of Colorado*
- (i) *Southern Ute and Ute Mountain Indian Reservations*

Plate I and Plate II set forth the drainage area of the San Juan River. It is a principal tributary of the main stream of the Colorado River. It is an interstate stream and has its sources in New Mexico and Colorado. The main stream of the San Juan intersects both the Southern Ute and the Ute Mountain Indian Reservations within the State of Colorado. It will be observed that both Reservations are intersected by several tributaries of the San Juan rising in the State of Colorado.

There has never been a determination by the United States Trustee—or otherwise—of the present and future

³⁴APPENDIX, Pages 12, 14, 15.

³⁵See above, page 8, footnote 16.

water requirements of the Southern Ute or Ute Mountain Indian Reservations in either the main stream of the San Juan River or the tributaries of that stream. Present arrangements in regard to some of the water sources for the Reservations have been made but are not complete nor the import of them fully known. They are now under study.

(ii) *San Juan River Drainage—Colorado's Water Division No. 7*

Colorado's Water Division No. 7 includes "the drainage basins of the San Juan River, Rio Piedra, Rio Las Animas, Los Pinos River, La Plata River, Rio Mancos, and streams tributary to said rivers and creeks as well as * * *" portions of the Dolores River.⁸⁶ Fear of loss by the Southern Ute Tribe of their invaluable *Winters Doctrine* rights to the use of water is a matter of public record.⁸⁷

Application of the laws of Colorado to the Indians' rights either by a judicial declaration in the adjudications in question or the Justice Department policy declarations,⁸⁸ presents to the Indians the gravest threat to them since the pronouncement of the *Winters Decision* in 1908.⁸⁹ Full import of the control by Colorado of Indian rights to the use of water, if that comes to pass, is succinctly stated in these terms:

"148-21-17. Administration and distribution of waters.—(1) The state engineer shall be respon-

⁸⁶11 Colo. Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-8(8).

⁸⁷Memorandum April 9, 1970 to Chairman, Governor or President All Indian Tribes in the Eleven Western States from the Chairman, Southern Ute Tribal Council;

Letter March 31, 1970 to Congressman Wayne N. Aspinall.

⁸⁸See above, pages 7 and 8.

⁸⁹*Winters v. United States*, 207 U.S. 564 (1908).

sible for the administration and distribution of the waters of the state, and in each division such administration and distribution shall be accomplished through the offices of the division engineer as specified in this article.

“(3) In the distribution of water, the division engineer in each division and the state engineer shall be governed by the priorities for water rights and conditional water rights established by adjudication decrees entered in proceedings concluded or pending on the effective date of this article and by the priorities for water rights and conditional water rights determined pursuant to the provisions of this article. All such priorities shall take precedence in their appropriate order over other diversions of water of the state.”⁴⁰

It is, of course, elemental that State police regulation over Indian rights to the use of water by Colorado's state engineer is tantamount to control of life on those arid Reservations. Regarding Indian lands in the Colorado River Basin the Supreme Court points up very well in these terms the Indian crisis in these cases:

“* * * the lands were of the desert kind—hot, scorching sands—and that water from the [Colorado] river would be essential to the life of the Indian people * * *.”⁴¹

When the Highest Court thus recently “reaffirmed” the *Winters Doctrine*—Justice Department wants an-

⁴⁰APPENDIX, Page 86.

⁴¹Arizona v. California, 373 U.S. 546, 599 (1963).

other reaffirmance—the Court was paraphrasing its earlier statement made in 1908 which is as follows:

"The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians [grantors] and deliberately accepted by the Government [grantee]. * * * Did they [the Indians] give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate? * * * If it were possible to believe affirmative answers, we might also believe that the Indians were awed by the power of the Government or deceived by its negotiators. Neither view is possible. The Government is asserting the rights of the Indians."⁴²

(2) *San Juan River Reservations Outside of the State of Colorado—Navajo and Jicarilla-Apache*

Plate I and Plate II again are keys to American Indian interests outside of Colorado in the Supreme Court decision from that State, the Justice Department's conduct of the matter and the basic assault upon Indian law respecting their rights to the use of water which is referred to by the Justice Department as "reserved water rights of the United States."

Crucial to the Navajo Indian Reservation in the States of New Mexico, Arizona and Utah, is this fact:

The main stream of the San Juan River traverses the northeast corner of the vast and arid Navajo Indian Reservation in the State of New Mexico,

⁴²Winters v. United States, 207 U.S. 564, 575-576 (1908).

and the southeastern corner of Utah, constituting the northern boundary of the Navajo Reservation in that State for its entire length after that river leaves the Ute Mountain Reservation in the State of Colorado, and courses almost due west to its confluence with the Colorado River in the States of Utah.

Crucial likewise to the Jicarilla-Apache Reservation in New Mexico is this fact:

Substantial quantities of water in the San Juan River arise upon and flow into that River from that Reservation.

American Indians in the San Juan River Drainage occupying four Reservations in four States are vitally and directly involved in the proceedings before the Supreme Court in regard to

(i) Their titles to rights to the use of water in the main stream and the tributaries of the San Juan River;

(ii) The crucial issues presented by the Colorado Supreme Court's seeming avoidance—albeit in error—of the principles of the *Winters Doctrine* upon which the very existence of the four Reservations is predicated;

(iii) The anomalous request of the Justice Department for a reaffirmance of the *Winters Doctrine*—the “reservation theory”—which was “reaffirmed” as recently as 1963 after years of application;

(iv) The threat that their rights to the use of water will be subjected to the police regulations of the four States, pursuant to which the States

administer, adjudicate, and control those rights coming within their respective jurisdictions;

(v) Policy propositions proffered by the Justice Department to the Colorado courts, all as reviewed above.

Total inadequacy of the Justice Department's cryptic footnote to the Highest Court about "no knowledge" of Indian rights and interests is abundantly manifested and underscored as the facts and the law are analyzed.

(3) *Green River, White River, Yampa River, Tributaries of the main stream of the Colorado River Uintah and Ouray Indian Reservation—State of Utah*

Plate I and Plate II disclose the principal sources of water for the Uintah and Ouray Indian Reservation in the State of Utah. It will be observed that the Green River, a major tributary of the Colorado River, and the White River traverse that Reservation. Those facts are of great importance here for the Justice Department in its brief makes this statement to the Highest Court:

"In addition [to purported service in Water Division No. 5] the Attorney General received similar resumes of applications filed in Water Divisions 4 and 6 during the month of December 1969."⁴³

Reference is first made to Colorado's Water Division No. 6. It is described as follows:

"* * * all lands in the state of Colorado in the drainage basins of the White river, the Yampa or Bear river, the Green river * * *, and all of their tributaries."⁴⁴

⁴³APPENDIX, Pages 47-48.

⁴⁴Vol. 11, Colo. Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-8(7).

Similar to the Navajo Reservation in New Mexico, Arizona and Utah, the Uintah and Ouray Reservation is almost wholly reliant upon the rivers in the State of Colorado which are directly or implicitly before the Supreme Court in the *Eagle River and Water Division No. 5 Adjudications*. That Reservation is equally threatened by Colorado's Supreme Court decision, the interpretation of 43 U.S.C. 666, and the course of conduct adopted by the Justice Department throughout the entire proceedings in the Supreme Court.⁴⁵

- (4) *American Indian rights to the use of water in main stream of the Colorado River and its tributaries within the State of Colorado*

(i) *Water Division No. 5 Adjudication*

Magnitude of the importance of the two adjudications before the Supreme Court can readily be observed from Plates I and II when read in the light of the law of the Colorado River of which the Colorado State police regulations respecting rights to the use of water have significance, but far from dominance. Justice Department's presentation to the Supreme Court in its Petition for Certiorari and its briefs filed with the Supreme Court respecting the *Water Division No. 5 Adjudication*, say this: Colorado's "Water Division 5 includes the area drained by the Colorado River and its tributaries (excluding the Gunnison River), which also includes the former Water Division No. 37 in the *Eagle County* case", referred to here as the *Eagle River Adjudication*.⁴⁶ Succinctly, there is before the Supreme Court of the United States a decision of Colorado's highest

⁴⁵See above, pages 16 through 17 in regard to the San Juan River Drainage, Colorado's Water Division No. 7.

⁴⁶APPENDIX, Pages 47, 48, 76, 77-78.

court, the *Eagle River Adjudication* and the *Water Division No. 5 Adjudication*, the primary water source for the main stream of the Colorado River throughout its vast drainage. At issue is whether the courts of Colorado in the exercise of its police power, have jurisdiction and control over all of the rights of the National Government: “* * * in the drainage basins of the Colorado River and all of its tributaries arising within Colorado”,⁴⁷ with the exception of the Gunnison River which is likewise involved in another proceeding and will, of course, be subject to the Colorado decision in the absence of its reversal.

(ii) *Eagle River Adjudication*

In regard to the vast area and the water supply for the Entire Colorado River Basin, is this statement respecting the *Eagle River Adjudication* which under present Colorado law, is included in *Water Division No. 5*:

“The Eagle River is a substantial tributary of the Colorado River in Colorado.* * * The system drains 950 square miles and delivers to its confluence with the Colorado River an annual average of about 408,000 acre feet of water after all present upstream depletions.”⁴⁸

In the analysis of the discharge of the Colorado River and its tributaries at the State line the importance of the huge quantities of water produced by the Colorado River within the State of Colorado—including the Eagle River—will be emphasized. Reference is again made to the brief of the Justice Department from

⁴⁷Vol. 11 Colo. Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-8(6).

⁴⁸APPENDIX, Page 24, footnote 3.

which there is quoted the statement, "In addition, the Attorney General received similar resumes of applications filed in Water Divisions 4 and 6 during the month of December 1966."⁴⁹ The import of Water Division No. 6 was alluded to above. Comment is now made respecting Water Division No. 4.

(iii) *Water Division No. 4*

It is provided under the Colorado law that Water Division No. 4 encompasses "* * * the drainage basins of the Gunnison River and all that portion of the Dolores River and its tributaries north of the north township line of Township 45 North, New Mexico Principal Meridian."⁵⁰ Plate I and Plate II locate the Gunnison River which enters the Colorado River within the State of Colorado. It will be noted from those Plates that the Dolores River joins the Colorado in the State of Utah shortly after it crosses the common boundary of the State last mentioned and the State of Colorado.

(iv) *Supreme Court decreed rights to American Indians in the main stream of the Colorado River*

It has been emphasized above that the Supreme Court of the United States is fully cognizant that the Indian Reservations on the main stream of the Colorado River are not habitable without water from that stream.⁵¹ That Court likewise stated that the Indians have rights to the use of water sufficient "to satisfy the future as well as the present needs * * *" of those

⁴⁹APPENDIX, Pages 47, 48.

⁵⁰11 Colorado Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-8(5).

⁵¹Arizona v. California, 373 U.S. 546, 598-599 (1963).

Indian Reservations. It measured those rights on the basis of water requirements adequate "to irrigate all the practicable irrigable acreage on the reservations."⁵²

In keeping with that decision the Supreme Court "*** * * Ordered, Adjudged and Decreed**" Indian rights to the use of water on the main stream of the Colorado for the Chemehuevi Indian Reservation, the Cocopah Indian Reservation, the Yuma Indian Reservation, the Colorado River Indian Reservation, and the Fort Mojave Indian Reservation.⁵³ Please refer to the facing page

⁵²Arizona v. California, 373 U.S. 546, 600 (1963).

⁵³Arizona v. California, 373 U.S. 546 (1963):

**"IT IS ORDERED, ADJUDGED AND DECREED THAT
I For purposes of this decree:**

*** * ***

"(1) The Chemehuevi Indian Reservation in annual quantities not to exceed (i) 11,340 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907;

"(2) The Cocopah Indian Reservation in annual quantities not exceed (i) 2,744 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 431 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of September 27, 1917;

"(3) The Yuma Indian Reservation in annual quantities not to exceed (i) 51,616 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 7,743 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of January 9, 1884;

"(4) The Colorado River Indian Reservation in annual quantities not to exceed (i) 717,148 acre-feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 107,588 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of March 3, 1875, for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873, for lands reserved by the Executive Order of said date; November 16, 1874, for lands reserved by the Executive Order of said date, except as later modified; May 15, 1876, for lands reserved by the Executive Order of said date; November

of Plate I which tabulates the rights on the main stream of the Colorado River the Supreme Court decreed to the named Reservations.

Set forth above and graphically displayed on Plate I and Plate II are the American Indian interests in the main stream of the Colorado River and the tributaries of that stream within the State of Colorado. On the basis of those geographical aspects of this consideration reference will next be made to the equally important hydrological phenomena of the Colorado River and its tributaries.

(f) Seventy percent (70%) of all of the waters in the main stream of the Colorado River available to the Indian Reservations, the rights of which are decreed by the Supreme Court, are within the issues presented to that Court

Error in the Justice Department's denial of Indian interests in the issues now on review before the Supreme Court is evidenced by this statement by that Court:

"The Colorado River itself rises in the mountains of Colorado and flows generally in a south-

22, 1915, for lands reserved by the Executive Order of said date;

"(5) The Fort Mohave Indian Reservation in annual quantities not to exceed (i) 122,648 acre-feet of diversions from the main-stream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 18,974 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, and, subject to the next succeeding proviso, with priority dates of September 19, 1890, for lands transferred by the Executive Order of said date; February 2, 1911, for lands reserved by the Executive Order of said date; provided, however, that lands conveyed to the State of California pursuant to the Swamp Land Act [9 Stat. 519 (1850)] as well as any accretions thereto to which the owners of such land may be entitled, and lands patented to the Southern Pacific Railroad pursuant to the Act of July 27, 1866 (14 Stat. 292), shall not be included as irrigable

(This footnote is continued on the next page)

westerly direction for about 1300 miles * * * The river and its tributaries flow in a natural basin almost surrounded by large mountain ranges and drain 242,000 square miles * * * Much of this large basin is so arid that it is, as it always has been, largely dependent upon managed use of the waters of the Colorado River System to make it productive and inhabitable. * * * 2000 years ago the ancient Hohokam tribe built and maintained irrigation canals near what is now Phoenix * * *

American Indians were practicing irrigation in that region at the time white men first explored it."⁵⁴

Dating back to antiquity, and in 1858 when Lieutenant Ives made his historic trip up the main stream of the Colorado River, American Indians were likewise dependent upon the Colorado River to irrigate their crops. Indeed, the Mojaves and others were wholly dependent upon the Nile-like inundation of the Colorado River to irrigate their crops at the time and long prior to when Ives visited them in the year last mentioned.⁵⁵ Emphasis is placed upon the fact that the rights decreed to the Mojaves and others by the Supreme Court over 100 years after Ives, relate to the

acreage within the Reservation and that the above specified diversion requirement shall be reduced by 6.4 acre-feet per acre of such land that is irrigable; provided that the quantities fixed in this paragraph and paragraph (4) shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined; * * *."

⁵⁴Arizona v. California, 373 U.S. 546, 552 (1963).

⁵⁵Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development, 91st Congress, 1st Session, * * * A Compendium of Papers * * * Joint Economic Committee * * * Vol. 2, p. 467.

identical lands occupied by those Indians in ancient times.⁵⁶

Historically and today the Indians on the main stream of the Colorado River holding rights decreed to them by the Supreme Court are wholly dependent upon the waters which have their sources in the drainage area embraced within *Water Division No. 5 Adjudication* which, as stated, includes the drainage area within the *Eagle River Adjudication*; to a lesser extent in Water Division No. 4, No. 6, and No. 7, all of which have been alluded to above and are set forth on Plate No. II.

Under the heading "Average Annual Historic Flows at State Lines * * *" the Upper Colorado River Commission reports:⁵⁷

	Historic Flow at State Lines Acre-feet	* * *	Historic Contribution to Flow at Lee Ferry Acre Feet % of total
* * *			
Colorado	10,408,400	* * *	72.18

⁵⁶See Plate I and facing page.

⁵⁷Upper Colorado River Commission, First Annual Report, March 20, 1950; p. 7-9—*Note*: Flows of the main stream of the Colorado River and its tributaries are set forth in that report. That digest of flows at the Colorado State line is most instructive in regard to the San Juan River, White, Yampa and other rivers alluded to above, vital to the Navajo Indian Reservation, Uintah and Ouray and others. For other analysis of the flows and sources of water for the Colorado River, see *Arizona v. California*, Special Master's Report December 5, 1960, VII. Mainstream Supply pages 99 et seq.; 109 et seq.; C. Tables, p. 115 et seq.

For More current confirmatory data, see Water Resources of the upper Colorado River Basin,—Basic Data—U.S. Department of the Interior, Geological Survey Professional Paper 442—Text and Plates.

Relating geography of the Colorado River Basin to the hydrology of that Basin this fact is manifest:

70% of all of the water upon which the American Indians in the Colorado River Basin are dependent for their existence, arises within the State of Colorado and is a vital issue before the Supreme Court of the United States—belying the Justice Department's cryptic denial of Indian interests.

Equally important to this consideration is this authoritative, long-standing statement:

"Ninety-one percent of the water of the entire watershed has its origin in the mountains of Colorado, Wyoming, and Utah and not more than six percent comes from Nevada, Arizona, and California. * * *.⁵⁸

Vital to the Colorado River main stream American Indians with rights decreed to them by the Supreme Court is this statement:

"Ninety-four percent, therefore, of the water that passes Yuma originates above the Arizona-Utah line. * * * Nearly one thousand miles of canyon separate the lands upon which water may be beneficially applied in the upper basin from the lands upon which water may be beneficially used in the lower basin"—the five American Indian Reservations to which rights have been decreed are encompassed in that statement.

By reference to Plate I the States in the Upper Basin and the Lower Basin may be determined. Lee Ferry, point of division between the Basin's segments, is set

⁵⁸The Hoover Dam Documents, Wilbur and Ely, 1948, p. A64.

forth on that Plate, being located immediately south of the common boundary between Utah and Arizona.

(g) *Environmental crisis envelops Colorado River Basin—American Indians are first victims of it*

An environmental crisis—largely contrived by man—envelops the Colorado River Basin today. Undoubtedly the Highest Court will take judicial cognizance of that ecological debacle. It is a National disaster. There are two primary aspects of it, (1) A water shortage, as related to demands; (2) Pollution of the Colorado River water, likewise markedly attributable to Federal reclamation projects or Federally subsidized projects. Reference will be made to the water shortage within the Colorado River Basin.

(1) *Acute water shortage in Colorado River Basin
—a National disaster*

Catastrophic conditions prevail in the Colorado River Basin due to projects having been construed far beyond the available supply of water. American Indians within the Basin are probably the first victims of this mindless irresponsibility. Unquestionably judicial cognizance of this induced ecological debacle will be taken by the Highest Court. That crisis on the Colorado underscores the frivolous approach taken by the Justice Department in response to the urgent requests of the Indians, all as has been reviewed above.⁵⁹

In regard to the imperative need for the Supreme Court to take judicial notice of the environmental crisis is recent Congressional⁶⁰ and Executive action

⁵⁹See *supra*, pages 2 et seq.

⁶⁰Colorado River Basin Project Act, P.L. 90-537, Act of September 30, 1968, Sec. 201.

taken in regard to it.⁶¹ Reports in regard to the Colorado River Basin Project Act, having discussed further investigating respecting the crisis on the Colorado River, now implicitly before the Supreme Court, say this, among other things: “* * * the Secretary [of the Interior] can then proceed with investigations to determine the most economical means of augmenting the water supply of the Colorado River in order to serve the most critical water-short area of our Nation.”⁶² That quoted excerpt from a Congressional report, in blandest terms, describes most critical prevailing conditions throughout the Colorado River Basin. Other Congressional comments are more explicit respecting the planned destruction of the Colorado River and its implications for the politically weak American Indians in the Colorado River Basin:

“2. All of the studies indicate the presence of a serious water deficiency in the lower basin of the Colorado River; in fact, they show that a real crisis is being faced by Arizona, southern California, and Nevada. Furthermore, this same crisis is coming closer and closer to the upper basin with each passing year; therefore, the fundamental issue facing the Congress involves the question of the water supply deficiency of the entire Colorado River Basin.”⁶³

There is nothing new in the recognition that the yield of the Colorado River was far short of the planned

⁶¹See Western U.S. Water Plan, Federal-State Meeting, Denver, Colorado September 30—October 1, 1970; and Western U.S. Water Plan, Plan of Study, draft for review February 5, 1971.

⁶²Western U.S. Water Plan, Plan of Study, Draft for Review, February 5, 1971 P. II-3.

⁶³House Report 1849, 89th Congress, 2d Session, “The Committee’s Conclusions on Water Supply” page 34.

demands being placed upon it by Federal projects. These bleak statistics of the long-existing, now accentuating, catastrophic effects of over-building of the Colorado River are reflective of that fact.

"Over the years since the gages were installed at Lee Ferry in 1922 [pursuant to the Colorado River Compact], about 45 years ago, the 'virgin flow' at Lee Ferry, if there had been no depletions at all in the Upper Basin, would have averaged only 13.8 million acre feet annually. There is no dispute about this figure."⁸⁴

That figure must be contrasted with the total apportionment between the Upper and Lower Basins of 16,000,000 acre-feet annually.⁸⁵

"The Colorado is the world's most overworked river. So completely does man control this stream that it leaves the U.S. here at Yuma [California] as little more than a trickle. [See Plate I]

* * *

"Use and reuse of the Colorado's waters as it flows to the sea have pushed its salt content above federal standards for drinking. Salt also is damaging crops grown on land irrigated by the Colorado in California and Arizona."⁸⁶

To meet the crisis it is suggested that the appropriate course to pursue is to "lay another river down" in

⁸⁴Report on Central Arizona Project, Minority and Individual views, 90th Congress, 1st Session, Senate Report No. 408, page 89.

⁸⁵Colorado River Compact, Article III. The Hoover Dam Documents, Wilbur and Ely, 1948, A19; See also P. 25 for comments on allocation.

⁸⁶U.S. News & World Report, March 31, 1969.

the Colorado Basin * * *.”⁶⁷ Congress, reflecting the concern of the Columbia River Basin contingent, made short shrift of laying down another river, using the Columbia River water, in the Colorado Basin in the foreseeable future.⁶⁸ Acute nature of the water shortage in the Colorado River Basin is the immediate cause of pollution of the Colorado River.

(2) *Pollution of the Colorado River—an immediate irreparable loss to American Indians*

Pollution of the Colorado River due to high salinity is an immediate irreparable damage to the American Indian Reservations, particularly those Reservations with rights decreed to them in the main stream of the Colorado River by the Supreme Court.⁶⁹ Most recently it has been officially reported that salinity in that reach of the Colorado River constitutes a “Severe Problem In Some Areas Or Major Problem in Many Areas.”⁷⁰

It is the highly regarded United States Geological Survey that firmly established the fact that the pollution crisis on the Colorado River stems from the construction of highly subsidized Colorado River Basin projects and those for transmountain diversions. In a 1969 publication entitled “Lower Colorado River Water Supply—Its Magnitude and Distribution”,⁷¹ it is stated: “The principal components of the man-caused

⁶⁷Id. at p. 86.

⁶⁸“* * * for a period of ten years from the date of this Act, the Secretary shall not undertake reconnaissance studies of any plan for the importation of water into the Colorado River Basin * * *.” P.L. 90-537 Act of September 30, 1968, Sec. 201.

⁶⁹See Plate I.

⁷⁰Western U.S. Water Plan, W. Don Maughan, Water Resources Council Item 3, attachment.

⁷¹Geological Survey Professional Paper 486-D, page D 12.

depletion are (a) evapotranspiration resulting from irrigation or other uses within the drainage basin, (b) diversions to areas outside the basin, and (c) evaporation from reservoirs."⁷²

⁷²Evapotranspiration has been defined in regard to irrigation as follows: "Much irrigation water is lost by evaporation from soil and water and water surfaces or is transpired by plants. These processes in combination are called consumptive use or evapotranspiration." (Encyclopedia of Science and Technology, McGraw-Hill, vol. 7, page 270.) It is stated that the irrigated acreage within the Colorado River valley increased from 1,020,000 in 1910 to 1,425,000 acres in 1960. Immediate result of plant use of water has been described as follows: "Irrigation increases the concentration of dissolved mineral matter, or results in concentration of salts, in the return water, because the plants consume a large part of the water applied but only a small part of the salts. Also, mineral fertilizers and soil minerals are carried off in solution in the return water." (Arizona Water, Geological Survey Water Supply Paper No. 1648, 1966, page 12.)

In discussing another "man-caused depletion" of the Colorado River the Geological Survey states: "Water exports [from the Colorado River Basin] increased from relatively insignificant amounts prior to 1905 to more than 500,000 acre-feet in 1960." (Lower Colorado River Water Supply—Its Magnitude and Distribution, Geological Survey Professional Paper 486-D.)

In "MAN . . . an endangered species?" (United States Department of the Interior Conservation Year Book No. 4, page 57) those depletions from the Colorado valley are euphoniously described as "Taking Water Thro' the Mountains." Those takings occur in the upper reaches of the Colorado River and its tributaries which constitute the prime source of the water so essential to the continued existence of the Indian Reservations in that basin—indeed to all other users of Colorado River water.

Also taken from "MAN . . . an endangered species?" are references to the Bureau of Reclamation's Fryingpan-Arkansas Project "to divert Colorado River water into the Arkansas River drainage"; and to the San Juan-Chama Project, to divert Colorado water for irrigation in the Rio Grande River Basin and for municipal supplied for Albuquerque."

Final "man-caused" depletion of the Colorado River, as stated above, is evaporation losses from the numerous reservoirs constructed in that river. It is reported that from Lake Mead—one created by Hoover Dam—alone the evaporation loss "was about 90 inches per year from this reservoir surface. The volume of water evaporated was about 800,000 acre-feet. (Arizona Water, Geological Survey Water Supply Paper No. 1648, 1966, page 5.)

(This footnote is continued on the next page)

As a shadow follows the substance, "man-ca depletions have resulted in the quality of the Colorado River deteriorating beyond the point of grave danger. Keeping in the foreground the fact, as reviewed previously, that 500 parts per million of solids has been established as the minimal qualify for drinking water by the Public Health Service, a review of the progress of pollution that exists in the Colorado River is alarming. Studies by the United States Geological Survey reveal that at Lee Ferry where the Colorado River enters the Lower Basin, the weighted average of solids was found in the year 1967 to be 601 parts per

Continuing in regard to this type of loss, the last cited author declares, "Evaporation from other reservoirs on the Colorado River, from the channel of the river itself, and other reservoirs within Arizona, amounts to more than 500,000 acre-feet per year."

In addition to the great evaporation loss from Lake Mead, it has been estimated—very roughly—that in the Upper Basin of the Colorado River there will be reservoir losses between 600,000 and 700,000 acre-feet annually. (Report on Central Arizona Project, Minority and Individual views, 90th Cong. 1st Sess. Senate Report No. 408, page 89. See also earlier report on Lower Colorado River Basin Project, hearing before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, House of Representatives, 89th Congress, 1st Session, H. R. 4671 and similar bills, page 557.) Thus, conservatively calculated, the evaporation losses from the reservoirs on the Colorado River total roughly 2,000,000 acre-feet annually.

⁷³In the year 1962 the United States Department of Health, Education and Welfare established standards for potable water. Among other things that Federal agency declared: "Drinking water shall not contain impurities in concentrations which may be hazardous to the health of the consumer." Straight-facedly it adds that drinking water "shall not be excessively corrosive to the water supply system." Criteria were then established in the following terms: "The following chemical substances should not be present in a water supply in excess of the listed concentrations * *

"Total dissolved solids [salts] * * * 500" parts per million (Public Health Service Drinking Water Standards 1962, page 10). *Note.* "The dissolved minerals in water commonly are called salts. This term is used in a chemical sense, however; it does not imply that all these minerals are salts in the ordinary sense, such as table salt (sodium chloride)."

lion.⁷⁴ Proceeding downstream, near Grand Canyon, Arizona, the water quality disclosed an increase in salts, weighted average 663 parts per million.⁷⁵ Pollutants flow into the Colorado River from all sides. Salts in the Virgin River, a main stream tributary, when tested had a weighted average of 1780 parts per million.⁷⁶

At each point of measurement on the main stem of the Colorado River the pattern of increased contamination continues. Immediately above the Fort Mojave Indian Reservation in Arizona and California the salts in the river range up to 700 parts per million; at the Colorado River Indian Reservation below Parker, Arizona, they are well above 700.

Finally, at the Yuma Indian Reservation, a lateral from the gargantuan All-American Canal which supplies the Imperial Valley with irrigation water, the weighted average of salts was 848 parts per million at the time of the testing.⁷⁷

Those statistics are not new nor prosaic to California. For the waters of the Colorado River underlie the vast economy of Southern California. Destroy the supply of Colorado River water and the destruction of that immense economy necessarily follows. On September 18, 1969, under this headline "Rising Salinity of Colorado River Called Ominous" a debacle - albeit "man-caused"-is described.⁷⁸ It is then followed by this statement, truly ominous: "Entire Crops May Be Phased Out in 2 Areas, Water Control Unit Told."

⁷⁴Water Resources Data For Arizona, Part 2, Water Quality Records, page 14.

⁷⁵Id., page 32.

⁷⁶Id., page 40.

⁷⁷Id., page 83.

⁷⁸Los Angeles Times, September 18, 1969.

Following those statements State and Federal officials reviewed in lay terms a grave threat to one of the world's great sources of food supply. At Imperial Dam—head-works for the All-American Canal referred to above, it is stated: “* * * the river's salinity, now standing at an average of 850 parts of dissolved solids per million parts of water at Imperial Dam, would rise to 1,300 parts per million shortly after the year 2,000.” The report continues, “* * * the evaporation of large quantities of pure water from the surfaces of the lakes created behind the dams built on the river” is one of the primary reasons for the sharp increase in salts and the precipitous decline in water quality. What the California official did not add is that the Colorado River Basin Project contemplates numerous additional dams throughout the Colorado River Basin and that the Central Arizona Project as now planned, together with now abuilding transmountain diversions, will further deplete that stream.

In concluding, the Federal officials declared: “* * * by 2,010, dissolved solids would rise to 1,223 parts per million at Imperial Dam and 990 parts per million at Hoover Dam further upriver. The respective figures in 1960 were 759 and 697” parts per million.

This grave indictment in regard to man-made pollution in the Colorado River can be made on behalf of the Fort Mojave, Chemehuevi, Colorado River Indian Tribes, Cocopahs and the Quechans of Fort Yuma—Trustee, United States of America has subsidized Federal reclamation projects so far in excess of the available supply of water that each of the Reservations is confronted with an ecological disaster from stream pollution. That disaster is accentuated not only by exist-

ing projects but those that are authorized and soon to be undertaken. Reference in that regard is made to the Central Arizona Project, final coup administered by the Federal agencies to the American Indians in the Colorado River valley on the Reservations to which the Supreme Court has decreed rights in the main stream of the Colorado River.

(h) *Central Arizona Project being constructed in disregard of water shortage, pollution—final coup to the American Indians in the Colorado River Basin*

As now contemplated the Central Arizona Federal Reclamation Project will pump water from the over-sold, over-appropriated, and polluted Colorado River approximately 1,200,000 acre-feet of water annually. Water for that project is not available—a well known and proved fact. Plans presently contemplate that the Colorado River water which will be taken, if the project is built, will be pumped from the Bill Williams River arm of Lake Havasu, immediately above Parker Dam, downstream from the Fort Mojave Indian Reservation and the Chemehuevi Indian Reservation, but above the Colorado River, Cocopah and the Yuma Indian Reservations.⁷⁰ Point of diversion from the Colorado River in its present polluted and diminished flow condition is of no consequence from the standpoint of the American Indians to be destroyed by it. Commit water from a stream to a non-Indian development and the pattern for seizure of Indian water in disregard of Indian prior and paramount rights is an accomplished fact—albeit illegal and wholly immoral.

⁷⁰Pacific Southwest Water Plan, Supplemental Information Report on Central Arizona Project, Arizona, pp. 27 et seq.

Recently this stark statement in regard to the planned environmental disaster on the Colorado River, was re-published:

"While there is disagreement with respect to time, the cold fact remains that eventually the water supply for the central Arizona project from mainstream Colorado River water will be reduced to less than 300,000 acre feet annually unless augmentation becomes a reality."⁸⁰

Succinctly stated, the quoted excerpt sets forth the shocking fact, a project costing in excess of a billion dollars is in the process of being constructed. It is designed for 1,200,000 acre-feet of water annually and as the quoted statement declares, "the cold fact remains * * *" that the Central Arizona Project has a deficit of 900,000 acre-feet of water annually below its planned and constructed capacity.

Exactly when that 900,000 acre-feet annual deficit will take place is not known. What is known is this fact:

"In the absence of imported water, the average divertible supply of water for the central Arizona unit is estimated to be 900,000 acre-feet by the year 2000."⁸¹

First victims of the catastrophe on the Colorado River will be the American Indians. Important in regard to the seizure of the Indian rights to the use of water de-

⁸⁰Western U. S. Water Plan, Plan For Study, Draft for Review February 5, 1971, page II-4.

⁸¹House Report 1849, 89th Congress. 2d Sess., "The Committee's Conclusions on Water Supply", page 34.

creed by the Supreme Court and those which have not been decrees, is the concerted well-planned attack upon the *Winters Doctrine* pursuant to which their prior and paramount rights have been guaranteed. That attack upon the Indian legal rights to water is the next phase of this consideration.

LEGAL PRINCIPLES RESPECTING AMERICAN INDIAN RIGHTS TO THE USE OF WATER IN GENERAL, AND THOSE INDIAN RIGHTS IN THE MAIN STREAM AND TRIBUTARIES OF THE COLORADO RIVER WITHIN THE STATE OF COLORADO

(a) *American Indian Winters Doctrine rights to the use of water [erroneously included by the Justice Department in its definition to the Supreme Court of "reserved rights of the United States"]*

- (1) *Interests in real property;*
- (2) *Immemorial rights;*
- (3) *Invested rights*

A statement of the pertinent facts as they relate to the waters of the main stream of the Colorado River and the tributaries of that stream within the State of Colorado, has been completed. Likewise reviewed has been the shortage of water in the Colorado River Basin; the grave pollution problem in that Basin; the tragedy of the Central Arizona Project.

In the paragraphs which follow there will be reviewed the legal predicates upon which American Indians have title to their rights to the use of water.

- (1) *American Indian rights to the use of water and interests in real property of the high and dry lands with all the attendant benefits flowing from the principle accruing to them*

It is elemental that rights to the use of water and interests in real property.⁸² Equally elemental is the principle that rights to the use of water are appurtenant and do not relate to the corpus of the land. Being part and parcel of the land itself, rights to the use of water in the absence of establishing a contrary intention, pass with the land is conveyed. Measure of the Indian rights to water with the conveyance, assuming a requisite express or implied is shown, is, of course, determined upon the facts of each transaction.⁸⁴

Adjudication of American Indian rights to water is accomplished through actions to quiet title. On the subject these statements have been made:

"The suit [to protect the Yakima rights] and other proceedings designed to procure the adjudication of water rights, was in its purpose to perfect one to quiet title to realty. *Ricketts v. Cattle Co. v. Miller & Lux*, 9 Cir., 1915, affirmed 218 U.S. 258."⁸⁵

⁸²Wiel, *Water Rights in the Western States*, 3d ed. sec. 18, pp. 20, 21; sec. 283, pp. 298-300; sec. 284, pp. 300-301; *United States v. Chandler-Dunbar Water Power Co.*, 251 U.S. 53, 73 (1913); *Ashwander v. TVA*, 297 U.S. 288, 300 (1936).

⁸³*Fuller v. Swan River Placer Mining Co.*, 12 Cal. 19 Pac. 836 (1898);

Wright v. Best, 19 Cal.2d 368; 121 P.2d 702 (1942); *Sowards v. Meagher*, 37 Utah 212; 108 Pac. 111 (1902). See also *Lindsey v. McClure*, 136 F.2d 65, 70 (9th Cir. 1943).

⁸⁴*United States v. Powers*, 305 U.S. 527, 533 (1933).

⁸⁵*United States v. Ahtanum Irrigation District*, 321, 339 (CA 9, 1956).

Continuing, the court stated:

"Furthermore, as in the case of other suits to quiet title, the defendants should have been required to appear by answer and set forth their claims of right to the use of the waters of the stream. *Reynolds v. Schmidt*, 10 cir., 40 F.2d 238, 240."⁸⁶

Colorado's Supreme Court and other authorities on the subject reiterate the basic concepts of law respecting the nature of rights to the use of water and the remedies adopted in regard to the protection of those rights, in these terms:

"It is manifest from a careful examination of our statutes and from the repeated decisions of our courts that our proceedings, not technically one to quiet title, is quite analogous thereto * * *."⁸⁷

The same court described the proceedings as being *sui generis* in the nature of an action *in rem* with the right to the use of the water the subject matter of the decree.⁸⁸ Kinney has commented upon the subject in these terms:

"In Colorado, where the award of the water is made by the Courts to ditches which are given certain numbers according to their respective priorities * * * such an action may be regarded as strictly one in rem * * *."⁸⁹

⁸⁶*Ibid.*

⁸⁷*Crippen v. X Y Irr. Co.*, 32 Colo. 447, 76 Pac. 794 (1904).

⁸⁸*Louden v. Handy Ditch Co.*, 22 Colo. 102, 43 Pac. 535 (1897).

⁸⁹Kinney on Irrigation and Water Rights, page 2844, sec. 1569.

It is observed in passing that:

"In this state [Colorado] the right to the use of water for irrigation is deemed real estate, and is a distinct subject of grant, and may be transferred either with or without the land."⁹⁰ * * *

On that background consideration will be directed to other elements of the American Indian rights to the use of water and the concerted attack upon those Indian rights before the Supreme Court and elsewhere.

(2) *Immemorial Indian rights*

Long established tenets of Anglo-Saxon jurisprudence in regard to interests in real property and the conveyancing of them, have been applied by the Supreme Court respecting immemorial rights, title to which resided in many American Indian Tribes antecedent to the European invasion of the North American Continent. Reference in that connection is made to the case of *United States v. Winans*.⁹¹ In *Winans* there were Yakima Indian Nation rights of fishery in the Columbia River reserved by the Indians in their Treaty of 1855 with the United States which were the subject of attack.⁹² It is, of course, elemental that the right of fishery is an interest in real property.⁹³ Applying to that Treaty the basic precepts of the law of real prop-

⁹⁰David v. Randall, 44 Colo. 488; 99 Pac. 322 (1908).

⁹¹198 U. S. 371 (1904).

⁹²Id. at 377-378 (1904).

⁹³In support see "Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development," 91st Cong., 1st Sess., * * * A Compendium of Papers * * * Joint Economic Committee * * * pp. 460-471 et. seq.

erty, the Highest Court had this to say: "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians * * *

the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted."⁹⁴

In declaring the Treaty between the Yakimas and this Nation immune from control or vitiation by a license to fish issued by the State of Washington, the Supreme Court had this to say:

"* * * the [Treaty] right was intended to be continuing against the United States and its grantees as well as against the State [of Washington] and its grantees."⁹⁵

Rejecting the contention that in some manner a Treaty could be violated by the issuance of a patent omitting reference to it, the Court ruled:

"* * * The Land Department could grant no exemptions from its provisions. It makes no difference, therefore, that the patents issued by the Department are absolute in form. They are subject to the treaty as to other laws of the land."⁹⁶

Sound and explicit principles of Constitutional law based upon the supreme law of the land and equally fundamental principles of real property law, are the basis of the *Winans Decision*. Those concepts, as will be reviewed, are equally applicable to the prior, paramount and immemorial rights to the use of water of the American Indian Tribes who entered into Trea-

⁹⁴U.S. v. *Winans*, 198 U.S. 371, 381 (1904).

⁹⁵U. S. v. *Winans*, 198 U.S. 371, 381 (1904).

⁹⁶*Id.*, at 382.

ties or agreements with the Nation establishing their Reservations.

Reiteration of the legal concepts of the *Winans Decision* enunciated by the Supreme Court came about very soon by the Court in the *Winters Decision*,⁹⁷ respecting the Fort Belknap Indian rights to the use of water in the Milk River in Montana. There are striking factual and legal parallel between *Winans* and *Winters*. Both involved Indian Tribes in the status of grantors to the grantee United States, Trustee. Involved in both is the immunity of covenants between the Indians and the Nation from the admission of States into the Union, or State law. Crux of the *Winans* and *Winters Decisions* entailed interpretations of documents pursuant to which the Indians granted away vast areas—retaining nevertheless their immemorial title to interests in real property, immune from State law, to all that they did not grant.

Few cases have simpler facts, law and logic contained in them than does *Winters*. There are two salient issues: The meaning of an agreement between the Indians, grantor, and the Federal Government, grantee, as it relates to rights to the use of water; the effect of the admission of the State of Montana into the Union upon that agreement as it pertains to those rights. In the words of the Court regarding *Winters*: "The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation. In the construction of this agreement there are certain elements to be considered that are prominent and significant."⁹⁸

⁹⁷*Winters v. United States*, 207 U.S. 564 (1908).

⁹⁸*Winters v. United States*, 207 U.S. 564, 575-576 (1908).

History of the relationship between the Indian Tribes and the National Government antecedent to the May 1888 agreement, as recited below, is important for it reflects the series of cessions of vast areas of land by the Indians, the last of which was the May 1888 agreement upon which, as the Supreme Court states, the *Winters Decision* "turns."⁹⁰

⁹⁰The facts of the *Winters Decision* in which the doctrine was enunciated, are of great importance for they go far in establishing the Federal—State—Indian relationship. Those facts are reviewed in some detail in the opinions of the Court of Appeals for the Ninth Circuit which were affirmed by the Supreme Court. (*Winters v. United States*, 143 Fed. 740, 741 (CA 9, 1906); *Winters v. United States*, 148 Fed. 684 (CA 9, 1906)) Involved were the rights to the use of water in the Milk River as they related to the Fort Belknap Indian Reservation in the State of Montana.

Respecting the background of those claimed rights to the use of water the Court of Appeals reviewed these salient facts:

"* * * By the provisions of article 4 of the treaty of October 17, 1855, proclaimed April 25, 1856, [Treaty with the Blackfeet, 1855, 11 Stat. 657] there was established and reserved to the Ft. Belknap Indians, and other Indian tribes, as and for their home and abiding place, nearly all that part of the state lying north of the Mussel Shell River, and extending from the crest of the main range of the Rocky Mountains eastward, approximately to what is now the western boundary line of the Ft. Peck Indian reservation. * * * By the terms and provisions of this treaty the Ft. Belknap Indians reserved to themselves the 'uninterrupted privileges of hunting, fishing, and gathering fruit, grazing animals, curing meat, and dressing robes.' Article 3 of Treaty, 11 Stat. 657. The territory which was so set apart and reserved to them at that time embraced the channel and the waters of Milk River from its source to its mouth lying within the confines of the United States. This continued to be the abode of these Indians until 1874, [18 Stat. 28, Ch. 96—An act to establish a reservation for certain Indians in the Territory of Montana.] at which time their territory was reduced so as to embrace nearly all that part of Montana lying to the north of the Missouri river, and extending from the Rocky Mountains eastward to the Dakota boundary line including Milk River. * * * The tract so set apart remained Indian country and the Indian reservation of these Indians until 1888, at which time the present Ft. Belknap Indian

(This footnote is continued on the next page)

As the resumé of history discloses, and in the words of the Court, "The reservation was a part of a very much larger tract which the Indians had the right to occupy and use * * *" which was adequate for "a nomadic and uncivilized people." Continuing, the Court pointed out that the Nation and the Indians desired for the Indians "to change those habits and to become a pastoral and civilized people." The Indians under the agreement of May 1888, as the Court recognized, were to occupy a much reduced area which it described as follows: "The lands were arid and, without irrigation, were practically valueless." It was on that background of the May 1888 agreement between

reservation was carved out of the large reserve established in 1874 as their 'permanent home,' with the center of Milk river as the northern boundary line of the reservation, and which is now its northern boundary line." (25 Stat. 113, 114, Act of May 1, 1888, Ch. 213,—An act to ratify and confirm an agreement with the Gros Ventre, Piegan, Blood, Blackfeet, and River Crow Indians in Montana, and for other purposes.)

In upholding the rights of the Indians the Court of Appeals in its first opinion declared:

"In conclusion, we are of opinion that the court below did not err in holding that, 'when the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of Milk River' at least to the extent reasonably necessary to irrigate their lands. The right so reserved continues to exist against the United States and its grantees, as well as against the state and its grantees." (Winters v. United States, 143 Fed. 740, 749 (CA 9, 1906)).

Of interest is the fact that the language used by the trial court and affirmed by the Court of Appeals for the Ninth Circuit, is very similar to that used by the Supreme Court in the *Winans Decision* although that authority is not cited.

In the opinion affirming the final injunctive decree against *Winters* the Court of Appeals further stated:

"* * * by the express terms of that treaty there was reserved to the Indians the waters of Milk River as a part and parcel of the reservation set apart to them." (148 Fed. 684, 686 (CA 9, 1906)).

the Indians and this Nation that the Court established the criteria pursuant to which that agreement would be interpreted. It is important to observe this crucial sentence from the decision:

"The Government is asserting the rights of the Indians."¹⁰⁰

Those rights to the use of water, as the Supreme Court states, were reserved by the Indians when they granted other properties to the National Government under the 1888 agreement. In regard to "the rights of the Indians" without which the lands they retained under the agreement are "practically valueless", the Court continued its analysis: "And yet, it is contended, the means of irrigation were deliberately *given up by the Indians and deliberately accepted by the Government*", reaffirming in that quoted statement the Indian-grantor, the Nation-grantee, situation respecting the agreement of 1888. (Emphasis supplied)

Proceeding to reject the "further contention" that the Indians, knowing tht the lands without water were "practically valueless" nevertheless granted away their rights, said: "The Indians had command of the lands and the waters—command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization." The Court then asked these crucial questions: "Did they give up all this? Did they reduce the area of their occupation and give up the waters which made it valuable or adequate?"¹⁰¹ Responding to its rhetorical questions, the Court stated: "If it were possible to believe affirmative answers, we might also believe

¹⁰⁰Winters v. United States, 207 U.S. 564, 576 (1908).

¹⁰¹Winters v. United States, 207 U.S. 564, 576 (1908).

that the Indians were awed by the power of the Government or deceived by its negotiators." In declaring that the Fort Belknap Indians retained—did not convey—their immemorial rights to the use of water in the Milk River, the Supreme Court emphasized:

"The Government is asserting the rights of the Indians",—not those of the United States.

Having thus declared that the Indian had retained their rights in the Milk River under their 1888 agreement—had not conveyed them to the United States—the Supreme Court presented the second phase of its opinion pertaining to the claims that the admission of Montana into the Union and the laws of that State in some manner denigrated the Indian title to the rights thus retained. From that opinion this excerpt is taken:

"Another contention of appellants is that if it be conceded that there was a reservation of the waters of Milk River by the agreement of 1888, yet the reservation was repealed by the admission of Montana into the Union, February 22, 1889, c. 180, 25 Stat. 676 'upon an equal footing with the original States.' "¹⁰²

In rejecting that contention the Supreme Court again alluded to the May 1888 agreement, denying that the admission of Montana "repealed" that agreement. It pointed out that Winters had to rely upon the same argument that the Indians did not retain rights to the use of water in the Milk River to sustain the second erroneous "contention."

Having declared that the Indians by the May 1888 agreement retained their rights to the use of water, the

¹⁰²Winters v. United States, 207 U.S. 564, 577 (1908).

Court said in regard to the relationship between Montana and the Nation—not the Nation and the Indians—that:

"The power of the Government [in its political relationship with Montana] to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. The *United States v. The Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690, 702; *United States v. Winans*, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years."¹⁰³

Reemphasizing the fact that the Indians retained their rights to the use of water, the Court reiterated its conclusion in these terms: "* * * it would be extreme to believe that within a year [after the agreement of May 1888] *Congress* destroyed the reservation and *took from the Indians the consideration of their grant*, * * *" of a vast land area to the United States, leaving the Indians without their rights to the use of water "a barren waste."

In another Supreme Court decision it applied the principles of the *Winans* and *Winters Decisions* in regard to the rights to the use of water retained by the Crow Indians pursuant to their Treaty of May 7, 1868, with the United States.¹⁰⁴ In applying the principles of the *Winters Decision* the Court, among other things, said this: "That the Treaty contains no definite provision concerning apportionment or use of waters." On that background the Court analyzed the issues there presented, specifically ruling "* * * that under the

¹⁰³*Ibid.*

¹⁰⁴*United States v. Powers, et al.*, 305 U.S. 527, 532 (1939).

Treaty of 1868 waters within the Reservation were reserved for the equal benefit of tribal members (*Winters v. United States*, 207 U.S. 564) * * *.”¹⁰⁵ In the *Powers Decision* the Court recognized that the rights to the use of water part and parcel of the land and passed with the transfer by an Indian of his allotment. It declared nevertheless “* * * we do not consider the extent or prices nature of respondents’ rights in the waters.”¹⁰⁶

Indian immemorial rights, their immunity from State laws, control, adjudication, were the subject of a recent decision. There, as in *Winans*, the State of Washington sought to have, without success, its laws in regard to rights to the use of water in some manner override the Yakima Indian Nation Treaty of 1855 with the United States.¹⁰⁷ Relative to *Winters* the court said this: “That the Treaty of 1855 reserved rights in and to the waters of this stream for the Indians, is plain from the decision in *Winters v. United States*, 207 U.S. 564.”¹⁰⁸

In declaring that the Yakimas retained—did not convey—those immemorial rights to the use of water, title to which was vested in them except as to those specifically granted—the court made the following ruling predicated upon an unbroken line of authority: “As in the *Winters* case, we must answer in the negative the questions there posed: “Did they [the Indians] give up

¹⁰⁵*Ibid.*

¹⁰⁶*Id.*, at 533.

¹⁰⁷*United States v. Ahtanum Irrigation District*, 236 F.2d 321 (CA 9, 1956); Appellees’ cert. denied 352 U.S. 988 (1956); 330 F.2d 897 (1965); 338 F.2d 307; Cert. denied 381 U.S. 924 (1965). For decree in case see 330 F.2d 915.

¹⁰⁸*United States v. Ahtanum Irrigation District*, 236 F.2d 321, 325 (CA 9, 1956).

all this? 'Did they [the Indians] reduce, the area of their occupation and give up the waters which made it valuable or adequate?' "¹⁰⁹

Continuing in regard to *Winters*, the court stated: "As was said in the *Winters* case, (207 U.S. 564, 576): 'The reservation was a part of a very much larger tract which the Indians had the right to occupy and use and which was adequate for the habits and wants of a nomadic and uncivilized people.' "¹¹⁰ Applying the concepts of the *Winans Decision* the court concluded: "When the [Yakima] Indians agreed to change their nomadic habits and to become a pastoral and civilized people, using the smaller reservation area, it must be borne in mind, as the Supreme Court said of this very [Yakima] treaty, that 'the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted.' *United States v. Winans*, 198 U.S. 371, 381." "¹¹¹

Rights retained under the Treaty relative to the source of water involved, the court said this respecting the Indian immemorial rights: "Before the treaty the Indians had the right to the use not only of Ahtanum Creek but of all other streams in a vast area." "¹¹²

Retention of those immemorial rights was adjudicated in these terms "The Indians did not surrender any part of their right to the use of Ahtanum Creek regardless of whether; the Creek became the boundary or whether it flowed entirely within the reservation." "¹¹³

¹⁰⁹Id. at 326.

¹¹⁰Ibid.

¹¹¹*United States v. Ahtanum Irrigation District*, 236 F.2d 321, 326 (CA 9, 1956).

¹¹²Id. at 326.

¹¹³Id. at 326.

Rejecting the contentions pressed by the State of Washington relative to its jurisdiction over the rights of the use of water retained by the Yakimas under their Treaty, the court dismissed them in these terms:

"It is too clear to require exposition that the state water right decree could have no effect upon the rights of the United States. Rights reserved by treaties such as this are not subject to appropriation under state law, nor has the state power to dispose of them. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 444."¹¹⁴

Underscoring the immunity of the Yakima rights from the control or acquisition pursuant to the laws of the State of Washington, this succinct statement was made respecting the Indian prior and paramount rights:

"No portion of that volume of water or the right to the use thereof, was open to appropriation or other acquisition under state law by the defendants or their predecessors in interest. *United States v. McIntyre*, 9 Cir., 101 F.2d 650, 653-4; *Cf. Federal Power Comm'n v. Oregon*, 349 U.S. 435."¹¹⁵

In keeping with the basic precepts of law, the Indian *Winters Doctrine* rights to the use of water retained by them—not granted to the United States—are sufficient to meet the present and future reasonable water requirements for their Reservations.¹¹⁶ On repeated occasions the principle has been sustained of immemorial ownership by the American Indians of their rights to

¹¹⁴*Id.* at 328.

¹¹⁵*United States v. Ahtanum Irrigation District*, 236 F.2d 321, 326 (CA 9, 1956).

¹¹⁶*Conrad Investment Co. v. United States*, 161 Fed. 829 (CA 9, 1908).

the use of water retained by them when they ceded away to the National Government vast areas of their land.¹¹⁷

(i) *Principles of Western and Indian law respecting interpretations of conveyances applied by Supreme Court in Winters*

In *Winters* the Supreme Court in these succinct terms stated the key issue before it:

"The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation. In the construction of this agreement there are certain elements to be considered that are prominent and significant."

It then declared that the Indians intended to retain rights to the use of water for their Reservation for it would be uninhabitable without water.¹¹⁸

In thus construing the document upon which the Supreme Court specifically adjudged its opinion turns, it applied a long-standing precept of law in Western United States respecting rights to the use of water.¹¹⁹ It declared in keeping with that Western law, that the Indians intended to retain rights to the use of water and the United States did not intend to have those rights granted to it.¹²⁰

¹¹⁷*Skeem v. United States*, 273 Fed. 92 (CA 9, 1921); *United States v. McIntire*, 101 F.2d 650 (CA 9, 1939). (In addition to Supreme Court decisions and others previously cited.

¹¹⁸*Winters v. United States*, 207 U.S. 564, 575-576 (1908).

¹¹⁹1 *Wiel*, *Water Rights in the Western States*, 3d ed., Sec. 550, pp. 586, 587.

¹²⁰See Colorado decisions adhering to the same principle of the intent to convey or not to convey rights, a matter of intention; *Denver Joint Stock Land Bank v. Markham*, 106 Colo. 509, 107 P.2d 313 (1940).

Another basic precept of the law respecting documents of grant from the Indians to the National Government was applied by the Supreme Court in *Winters* using these terms:

“By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences, one of which would support the purpose of the agreement and the other impair or defeat it.”¹²¹

Predicated upon those fundamental concepts of the law the Indians retained—did not grant their rights to the use of water to the National Government. *Winters*, *Powers*, *Conrad Investment Co.*, *Ahtanum*—all of the cases reviewed above pertained to immemorial rights to the use of water retained by treaties—not granted away—by the Indians in those decisions.

In the paragraphs which follow the Indian rights were conveyed to them by the United States as part and parcel of the lands which constitute their Reservations.

(3) *American Indian invested rights to the use of water*

Cruel and mindless acts of agents of the United States who determined the life or death of the American Indians must be kept in the foreground in this phase of the consideration. The American Indians on the main stream of the Colorado River are prime examples of that cruel mindlessness. They were unjustly deprived of their immemorial rights to the use of water in

¹²¹*Winters v. United States*, 207 U.S. 564, 576 (1908).

the Colorado River, dating back to antiquity, upon which they relied.¹²² Their rights were extinguished by Congressional enactments concerning which they had no knowledge. Those laws required claimants of title to prove their rights or lose them. Thus the Trustee succeeded to the Indian rights under its own laws—the laws that required the Trustee to protect and preserve those Indian rights.¹²³

There is now pending before the Supreme Court in the alleged issues before it, whether the rights to the use of water subsequently invested in the Indians will be stripped from them by perhaps the last cruel and mindless act of agents of the Trustee.

In the *Walker River Decision* the Court of Appeals for the Ninth Circuit declared that a reservation created by an 1859 Executive Order was entitled to divert and use water to meet the Indian needs.¹²⁴ It was recognized in that opinion that the *Winters Decision* was based upon a Treaty pursuant to which the Indians retained for themselves their rights to the use of water. Quite aside from that very material difference in the source of title, it said this: "The power of the Government to reserve the waters to the Indians and thus exempt them from subsequent appropriation by others is beyond debate."¹²⁵

¹²²"Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development," 91st Cong., 1st Sess., * * * A Compendium of Papers * * * Joint Economic Committee * * * pp. 478 et seq.

¹²³Fort Mojave Claim, 7 Indian Claims Commission, Docket 295, Findings of Fact.

¹²⁴United States v. Walker River Irrigation District, 104 F.2d 334, 336 (CA 9, 1939).

¹²⁵United States v. Walker River Irrigation District, 104 F.2d 334, 336 (CA 9, 1939).

Repeated reference has been made to the rights to the use of main stream water decreed by the Supreme Court to the Fort Mojave, Chemehuevi, Colorado River Indian Tribes, Cocopah and Fort Yuma Reservations. As stated, those Reservations are set forth on Plate I and the decreed rights tabulated on the facing page of that Plate. Those rights thus decreed to the Indians and their Reservations are invested rights—first taken from the Indians by the National Government and then restored to them. As in the *Walker River Decision* the Supreme Court recognized the power of the National Government to reserve land and rights to the use of water for the Indian Reservations. Having referred to “* * * the broad power of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV § 3 of the Constitution”, the Court said this:

“We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property.”¹²⁶

Rejecting the contentions of the State of Arizona which sought throughout to limit the Indian rights, the Highest Court continued:

“Arizona also argues that, in any event, water rights cannot be reserved by Executive Order. * * * In our view, these reservations, like those created directly by Congress, were not limited to land, but included waters as well. * * * We can give but short shrift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive.”¹²⁷

¹²⁶Arizona v. California, 373 U.S. 546, 598 (1963).

¹²⁷Arizona v. California, 373 U.S. 546, 598 (1963).

That the United States did reserve rights to the use of water in the main stream of the Colorado River for the Indian Reservations has been adjudged and decreed by the Supreme Court; that the Supreme Court decreed those rights to the Indians is free from doubt.¹²⁸

- (4) *American Indian immemorial and invested rights to the use of water in the main stream of the Colorado River and its tributaries throughout the Basin of that stream extend to the reach of the Colorado River within the State of Colorado and into the tributaries of that stream within that State*

Basic and fundamental tenets of Western law respecting rights to the use of water are here involved. No principle of that field of jurisprudence is more firmly established than that a right to use water must of necessity extend to and be enforceable to the very well-springs of the source in which the right exists. Colorado's Supreme Court at an early date in the relatively short history of Western water law reviewed the nature of the interest in its tributaries of a downstream owner of rights in the main stream and ruled: To say "* * *" that an appropriator from the main stream is subject to subsequent appropriators from its tributaries would be the overthrow of the entire doctrine" of prior appropriation.¹²⁹ Colorado's court in the same decision declared the obvious:

"All large streams are dependent upon tributaries for a supply of water. To cut off the water from such tributaries would be to destroy the capacity of the stream, to the injury of those below."

¹²⁸See above page 22, footnote 53.

¹²⁹Strickler v. Colorado Springs, 16 Colo. 61; 26 Pac. 313, 315 (1891).

On the subject of the downstream owner of rights to the use of water relying upon all upstream sources, the Supreme Court of Utah reiterated the principles adhered to by Colorado's court.¹³⁰

Nature of the right to protect the source of water is well stated in these terms by the Colorado Supreme Court: "It is a well-established principle in this jurisdiction that all waters are part of a natural water course, whether visible or not, constituting a part of the whole body of moving water."¹³¹

¹³⁰*Richlands Irrigation Co. v. Westview Irrigation Co.*, 96 Utah 403; 80 P.2d 458, 465 (1938):

"The entire watershed to its uttermost confines, covering thousands of square miles, out to the crest of the divides which separate it from adjacent watersheds, is the generating source from which the water of a river comes or accumulates in its channel. Rains and snows falling on this entire vast area sink into the soil and find their way by surface or underground flow or percolation through the sloping strata down to the central channel. This entire sheet of water, or water table, constitutes the river and it never ceases to be such in its centripetal motion towards the channel. Any appropriator of water from the central channel is entitled to rely and depend upon all the sources which feed the main stream above his diversion point, clear back to the farthest limits of the watershed."

Oregon's Supreme Court summarized the general proposition in this manner: "The rights of prior appropriators from a stream cannot be impaired by subsequent appropriations of water from its tributaries." (*Dry Gulch Ditch Co. v. Hutton*, 170 Ore. 656; 133 P.2d 601, 611 (1943).)

¹³¹*City of Colorado Springs v. Bender*, 148 Colo. 458; 366 P.2d 552, 555 (1961).

New Mexico's highest court, drawing on several authoritative sources, upheld the fundamental rights of a downstream user to exercise that right in all waters contributing to his source of supply, stating: "An appropriation when made follows the water to its original source, whether through surface or subterranean streams or through percolations." (*Templeton v. Pecos Valley Artesian Conservancy District*, 65 N.M. 59; 332 P.2d 465, 470 (1958)). Quoting the Colorado law on the subject, the New Mexico court set forth this basic proposition: "* * * The law in Colorado governing the first classification above suggested, i.e., underground waters which, if not intercepted, will ultimately find their way to a natural stream, is well settled. It has been fre-

The Supreme Court of Colorado, citing its earlier decisions, has summarized as follows: “* * * we have held that seepage and percolation belong to the river * * *.”¹³²

In specifically declaring and adjudicating the Indian rights in tributaries far removed from their lands, the Court of Appeals for the Ninth Circuit said this:

“The suggestion that much of the water of the Ahtanum Creek originates off the reservation is likewise of no significance. * * * it would be a novel rule of water law to limit either the riparian proprietor or the appropriator to waters which originated upon his lands or within the area of appropriation. Most streams in this portion of the county originate in the mountains [especially true of the Colorado River] and far from the lands to which their waters ultimately became appurtenant.”¹³³

Wiel has summarized the basic rights of downstream owners in the tributary water sources in these terms:

“* * * it is proper to look upon the stream [here the Colorado] as not merely consisting of the channel and flow at the point where the observer is standing, but as a composite body in which the upper branches and tributaries are an integral part.”¹³⁴

quently held by our appellate courts, from a very early date down to the present time, that all underground waters which by flowage, seepage or percolation will eventually, if not intercepted, reach and become a part of some natural stream either on or beneath the surface, are governed and controlled by the terms of the constitution and statutes relative to appropriation, the same as the surface waters of such stream.” (Ibid.)

¹³²Safranek v. Town of Limon, 123 Colo. 1330; 228 P.2d 975, 977 (1951).

¹³³United States v. Ahtanum Irrigation District, 236 F.2d 321, 325 (CA 9, 1956).

¹³⁴1 Wiel, Water Rights In The Western States, 3d ed., Sec. 337, p. 358.

Error pervades every phase and facet of the *Eagle River Adjudication* and *Water Division No. 5 Adjudication* by reason of the failure of the Justice Department to bring to the attention of the Highest Court the Indian rights in the streams in question. In the present status of the law and the facts which exist, that Court has no jurisdiction and, as stated above, the cases should be dismissed forthwith.¹⁸⁵

Reference is warranted to the law of the Colorado River which exempts Indian rights from its operation. It is provided in the Colorado River Compact that "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."¹⁸⁶ In the Upper Basin Compact it is provided that:

"Nothing in this Compact shall be construed as:

"(a) Affecting the obligations of the United States of America to Indian tribes;

* * * * *

"(c) Affecting any rights or powers of the United States of America, its agencies or instrumentalities, in or to the waters of the Upper Colorado River System, * * *."¹⁸⁷

Reference is also made to the scope of the decision in *Arizona v. California*.¹⁸⁸ That is a unique decision, markedly limited to documents and statutes which were before the Court. * * * we have decided" said the Highest Court, "that Congress has provided its own

¹⁸⁵See above, pages 2 et seq.

¹⁸⁶Hoover Dam Documents, Wilbur & Ely, 1948, p. 28, Art. VII.

¹⁸⁷Hoover Dam Documents, Wilbur & Ely, 1948, p. A181, Art. XIX.

¹⁸⁸373 U. S. 546 (1963).

method for allocating among the Lower Basin States the mainstream water to which they are entitled under the Compact."¹³⁹ The Court rejected the contention it could substitute its will for that of Congress and undertake its own "equitable apportionment." Adding an additional rejection, it states: "Nor does the Colorado River Compact control this case." Rather the Supreme Court emphasized that Congress exercised its Constitutional powers, to the exclusion of all else, in regard to the mainstream water in the Lower Basin.¹⁴⁰

Succinctly it was adjudged that the prime issues in *Arizona v. California* related strictly to "The Congressional scheme of apportionment" relating to an annual 7,500,000 acre-feet in the main Colorado River. It stated in regard to the Lower Basin and then only under the Congressional Act in question, that "* * * the tributaries are not included in the waters [7,500,000 acre-feet annually] to be divided but remain for the exclusive use of each State."¹⁴¹

In error—and going far beyond the limited scope of *Arizona v. California*—the Respondents say this, purporting to support their position that Congress subjected all of the rights of the United States to State police regulations:

"* * * The Master found it inappropriate to adjudge matters of interstate rights and priorities on the tributaries (Master's Report 332-334) and this Court noted that under § 18 of the Project Act 'regulation of the use of tributary water' was left to the states (Id. 588)."¹⁴²

¹³⁹Id. at 565.

¹⁴⁰Id. at 566.

¹⁴¹Id. at 567.

¹⁴²See Respondents' Brief, APPENDIX, p. 24; APPENDIX, p. 27, footnote 53.

That quoted excerpt was limited to the issues before the Supreme Court in regard to Arizona, California and Nevada. The State of Colorado was not a party to *Arizona v. California*. None of the issues involving the Boulder Canyon Project Act as amended and supplemented, has relationship with the alleged issues presented to the Supreme Court in the two adjudications, the subject of this consideration. Hence, as stated, Respondents commit grave error when they endeavor to make applicable against the Indian rights in the Colorado River and its tributaries within the State of Colorado the purported authorities upon which they rely in their attacks upon the Indian *Winters Doctrine* rights to the use of water.

- (5) *Good water quality is a property characteristic of American Indian rights to the use of water in the Colorado River—it has been violated*

There has been reviewed above the "*Pollution of the Colorado River—an immediate irreparable loss to the American Indians.*" It is a basic precept of the law that the owner of rights to the use of water is protected against the deterioration in water quality. Indeed, as the authorities set forth below disclose, the right to preserve the quality of water is commensurate with the right to a quantity of water. Manifestly that property characteristic of the rights to the use of water of the American Indians in the Colorado River has been violated.¹⁴³

¹⁴³APPENDIX, Page 30; *Markwardt v. Guthrie*, 18 Okla. 32; 90 Pac. 26 (1907); *Phoenix Water Co. v. Fletcher*, 23 Calif. 481, 487 (1863); *Wright v. Best*, 19 Calif. 2d 368; 121 P.2d 702 (1942); *Adams v. Portage Irr. & Res. & Power Co.*, 95 Utah 1, 72 P.2d 648 (1937); 95 Utah 20, 81 P.2d 368 (1938).

- (6) *Interior Department's general statement respecting American Indian rights and interests in the Colorado River Basin; its trust obligation to protect those rights*

A proper perspective of Indian rights to the use of water and the Nation's obligation in regard to those rights is well stated in the following excerpt from an official report by the Interior Department, "The Colorado River, * * * A Comprehensive Departmental Report * * * March 1946":

"Within the Colorado River Basin, * * * are 29 Indian reservations, 1 nonreservation Indian school and 2 sanatoria. The Indian land totals 26,823,062 acres, of which 1,271,117 acres are in trust allotments, 24,557,040 acres in tribal ownership and 994,905 acres in Government ownership. The combined Indian population of the area totals more than 80,000 the majority of whom are full-bloods. The largest single group is the Navajos in Arizona and New Mexico, who total more than 50,000, practically all of whom are full-bloods.

"These Indians and their resources in land and water rights are the special concern of the Federal Government. * * * These rights and obligations were recognized by the Colorado River Compact Commission as evidenced by article VII of the compact which reads as follows: 'Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian Tribes.' One of the Government's objectives in the development of the basin must be not only the protection of the Indian's purely legal rights but the discharge of its moral obligations as well." (P. 261)

In the paragraphs which immediately follow additional authorities and comment lend clarity to the nature of the rights of the American Indians so gravely imperiled by the Justice Department's course of conduct in the *Water Division No. 5 Adjudication* and in the *Eagle River Adjudication*.

AMERICAN INDIAN RIGHTS TO THE USE
OF WATER IN THE COLORADO RIVER AND
ITS TRIBUTARIES ARE PRIVATE INTER-
ESTS IN REAL PROPERTY HELD IN TRUST
BY THE UNITED STATES FOR THE INDIANS

In the President's Message of July 8, 1970, sharply condemning the Interior and Justice Departments for inherent conflicts of interest, the President said this: "The United States Government acts as a legal trustee for the land and water rights of American Indians. These rights are often of critical economic importance to the Indian people * * *." They are, indeed, the difference between life and death. Continuing, the President stated: "* * * frequently they are also the object of extensive legal dispute. In many of these legal confrontations,

the Federal Government is faced with an inherent conflict of interest. The Secretary of the Interior and the Attorney General must at the same time advance *both* the *National* interest in the use of land and water rights *and* the *private* interests of Indians in land which the Government holds as trustee."¹⁴⁴

Legal aspect of the trust obligations of the United States in regard to American Indian rights to the use

¹⁴⁴Congressional Record, Senate, July 9, 1970, pp. S 10894, S 10896, Sec. 8, Indian Trust Counsel Authority.

of water have been reviewed in detail.¹⁴⁵ Justice Department's publication provides a source, declaring the private nature of American Indian interests in real property, which include Indian rights to the use of water. By reason of their private character, just compensation to the Indians must be paid when the National Government in the exercise of its power of *eminent domain* takes those rights.¹⁴⁶

Nature of the private Indian property interests held in trust for them by the Nation, including their rights to the use of water, are sharply differentiated under the law from "public property", and by law are required separately to be administered.¹⁴⁷

¹⁴⁵Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development, 91st Cong., 1st Sess., * * * A Compendium of Papers * * * Joint Economic Committee * * * Vol. 2, pp. 469 et seq.

¹⁴⁶Federal Eminent Domain, Department of Justice Sec. 15. What constitutes "private property" under the Fifth Amendment. Page 56.

* * *

N. *Property of Indian wards*.—As guardian of the Indian wards, the United States has the power of management and control over lands occupied by the tribes or Indian allottees. Such lands prior to some division or allotment in severalty, are held by the tribe in common. While strict legal title is often in the United States, under the treaties, statutes, or executive orders creating their reservations, the Indian tribes usually have a full beneficial interest, described as a "right of perpetual use and occupancy." Since this right is not to be narrowly construed, the tribal interest has been treated for all practical purposes as equivalent to ownership of the land itself. Thus when there is taking of the whole tribal interest within the meaning of the Fifth Amendment, the Government must include as part of just compensation to the tribe the value of the natural resources on the land such as timber or minerals. Certain profits à prendre, such as the right to take fish or gather herbs, occasionally granted to Indian tribes, are also regarded as property rights. Pages 76 & 77.

See page 66—E. Interests in real property * * *.

See *United States v. Gerlach Live Stock Company*, 339 U.S. 725 (1950).

¹⁴⁷Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development, 91st Cong., 1st Sess., * * *

(This footnote is continued on the next page)

PRESIDENTIAL CONDEMNATION OF "INHERENT CONFLICT OF INTEREST" RESPECTING AMERICAN INDIAN RIGHTS WHICH PERVADES JUSTICE DEPARTMENT—"NO SELF-RESPECTING LAW FIRM WOULD EVER ALLOW ITSELF TO REPRESENT TWO OPPOSING CLIENTS IN ONE DISPUTE * * *"¹⁴⁸

(a) *Condemnation of Justice Department "inherent conflict of interest"*

Presidential condemnation of "inherent conflict of interest" within the Justice Department in regard to American Indian rights to the use of water must become the hallmark of a new day for the Indians. It is set forth in the heading of the present phase of the consideration. That conflict of interest within the Justice Department is exemplified by the *Water Division No. 5* and *Eagle River Adjudications*. All-pervasive nature of that conflict of interest and the devastation now being wrought upon the American Indians throughout Western United States extending far beyond the confines of the Colorado River, requires review.

(b) *Legislation introduced to correct Justice Department conflict of interest*

Acting in accordance with the President's Message condemning the Justice Department's inherent conflict of interest, corrective legislation was introduced in the last session of Congress. Bills were presented "To pro-

A Compendium of Papers * * * Joint Economic Committee * * * Vol. 2, pp. 490 et seq.

25 U.S.C. 1 et seq.; 5 U.S.C. 485;

Handbook of Federal Indian Law, Cohen, pp. 33 et seq.; 94 et seq.

¹⁴⁸Congressional Record, Senate, July 9, 1970, pp. S 10894, S 10896, Sec. 8, Indian Trust Counsel Authority.

vide for the creation of the Indian Trust Counsel Authority, and for other purposes.”¹⁴⁹ In substance the Congress would establish an Authority with power to represent American Indians in their struggle to preserve and protect their natural resources. That Authority would be independent of the Justice Department and Interior Department lawyers whose inherent conflict of interest the President condemned.

(1) *Senate hearings in regard to inherent conflict of interest*

Comprehensive hearings have been held by the Senate Subcommittee on Indian Affairs in regard to the legislation mentioned above.¹⁵⁰

(2) *Secretarial statement as to need to correct Interior and Justice conflict of interest*

Senators and Interior Department officials testified at length and in detail in regard to the grave damage to the Indians by reason of the conflict of interest in both the Interior and Justice Departments respecting Indian natural resources. American Indian representatives suffering at first hand from the conflicts, emphasized the great need for the legislation.

Assistant Secretary Harrison Loesch outlined in detail the dilemma created by the conflict. How the conflict permeates all aspects of American Indian rights was underscored by Assistant Secretary Loesch in this colloquy:

“Senator McGovern. And you are convinced the members of that [Pyramid Lake] task force

¹⁴⁹ H. R. 18727, S. 4165, 91st Congress, 2d Session.

¹⁵⁰ Hearings Before the Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs, United States Senate, “The President’s Recommendations On Indian Policy.” September 21, 25, 1970.

are free of the conflict-of-interest charge that might be raised, where a complicated matter of this kind is to be resolved.

* * *

"Mr. Loesch. I question, Mr. Chairman, whether in any such situation you can get rid of, in a committee or a task force, an inherent conflict of interest, because members of the task force are Federal employees who, in their daily jobs belong to some bureau or other.

* * *

"Mr. Loesch. The conflict of interest is certainly not confined, Mr. Chairman, to the Department of the Interior, and I think that we have tried very hard in the Department of Interior to resolve those conflicts.

"The conflicts spread all across the Government, and it is for this reason that an independent legal agency to attend to those conflicts is needed."¹⁵¹

It is impossible to perceive a more authoritative source than Assistant Secretary Loesch. He is daily confronted with the inherent conflict of interest in the Interior Department. His obligations entail that of acting as the agent for the Indian Trustee, the United States, and for agencies of the Federal Government now and historically in conflict with those Indian interests.

¹⁵¹Hearings Before the Subcommittee on Indian Affairs * * * United States Senate, * * * September 21, 25, 1970, P. 36, lines 4-14; P. 37, lines 6-12.

(3) *Justice Department conflict of interest most recently analyzed by report to Senate Judiciary Committee*

A most recent study published by the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, fully documents the Justice Department conflict of interest.¹⁵² Great significance must be ascribed to that publication by the Senate Judiciary Committee. It brings to focus the incredible duality of obligations in which the Justice Department is placed by its "inherent conflict of interest."

(4) *Conflict of interest in regard to American Indian property interests admitted by Justice Department*

It is admitted by the Justice Department officials—it could not be denied—that it purports to represent opposing Indian and non-Indian interests in the same litigation. This statement was made in the Justice Department's opposition to the legislation which has been discussed above:

"At the present time there is an Indian Division in the Office of the Solicitor, Department of the Interior, which serves as advisor to the Secretary of the Interior and the Bureau of Indian Affairs on legal matters. Litigation for [a] the purpose of enforcing or protecting rights possessed by Indians because of their being under the protective arm of the United States, and [b] the defense of claims brought against the United States and

¹⁵²91st Cong., 2d Sess., Committee Print, "A Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources, Subcommittee on Administrative Practice and Procedure * * *" Committee on the Judiciary.

its officers by Indians and Indian tribes, are handled by the Land and Natural Resources Division of the Department of Justice."¹⁵³

Full impact of that conflict of interest upon the American Indians cannot be measured. That the Indians have been, are now and in the future will be, unless immediate corrective action is taken, grievously injured by it is an indisputable fact.

DENIGRATION BEFORE THE SUPREME COURT OF THE AMERICAN INDIAN RIGHTS TO THE USE OF WATER—DISASTROUS TO THE INDIANS

- (a) GREATLY AID JUSTICE DEPARTMENT IN INDIAN "TAKING" CASES NOW PENDING BEFORE THE INDIAN CLAIMS COMMISSION, COURT OF CLAIMS AND ELSEWHERE; AND IN FUTURE LITIGATION
- (b) GREATLY AID JUSTICE DEPARTMENT IN REPRESENTING INTERIOR'S RECLAMATION BUREAU AND OTHER FEDERAL AGENCIES WHICH ARE NOW AND HAVE BEEN INVADING INDIAN RIGHTS TO THE USE OF WATER THROUGHOUT WESTERN UNITED STATES

Reference has been made to the divided obligations of the Justice Department. It is the aggressive "adversary" against the Indians in the proceedings before the

¹⁵³Undated letter from the Assistant Attorney General, Land and Natural Resources Division, to Mr. Kenneth R. Cole, Jr. Deputy Assistant to the President for Domestic Affairs, The White House Washington, D. C.

Indian Claims Commission and the Court of Claims, a matter of extended public record in both tribunals. In those courts and in many cases in Federal district courts the Justice Department vigorously attacks Indians' titles, claims, and equities.¹⁵⁴ Indeed, personnel of the Indian Claims Section of the Land and Natural Resources Division, Department of Justice, may be the most important, best staffed and competent in that Division. Its legal position is of necessity frequently diametrically opposed to the position of the General Litigation Section which has the obligation of representing the Indians' interest so vigorously opposed by the Indian Claims Section. Both Sections are administered by the same Assistant Attorney General—who, as stated above, admits the conflict of interest. All appellate cases in the ultimate, for and against the Indians, are the responsibility of the Solicitor General and his staff; hence, the grave contradictions in the *Eagle River* and *Water Division No. 5 Adjudications*.

A key defense relied upon by the Justice Department against Indians who are deprived of their homes and abiding places, has been stated as follows:

"* * * The Indian title [under certain circumstances] as against the United States is merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they see fit until such right of occupation has been surrendered to the government."¹⁵⁵

From the same source it is stated that when the National Government forces the Indians to abandon the

¹⁵⁴See 25 U.S.C. 70 n; 25 U.S.C. 345;

For a general statement of the responsibility respecting the Indian Claims Commission, see 41 Am. Jur. 2d, Indians, Sec. 21 and 22, pages 844-845.

¹⁵⁵41 Am. Jur. 2d, Indians, Sec. 23, p. 845.

land which they occupy, they are not entitled to just compensation under the Fifth Amendment of the Constitution. Executive order Indian Reservations, says the same source, do not invest Indians with compensable interests in the absence of Congressional recognition, express or implied, of the Indian title to their lands.¹⁵⁶ Hence the course of the Justice Department before the Supreme Court and in the courts below, is not beyond understanding, though not justified.

(a) *Denial by Justice Department of Indian interest in Colorado River and its tributaries related to present and potential claims*

Justice Department's anti-Indian position respecting the interests and the reasons for it, have recently been succinctly stated in these terms:

"* * * the defense of Indian Claims Commission proceedings forces upon that Department the role and also the mentality of being an adversary to many Indian claims to natural resources."¹⁵⁷

That role of adversary against the Indians is epitomized by its position before the Supreme Court in the *Eagle River and Water Division No. 5 Adjudications*. Its cryptic footnote to the Court—"To the best of our knowledge, none of the reserved water rights claimed by the United States in Water Division No. 5 * * * for public land which had been withdrawn for public use, "relate to Indian lands."¹⁵⁸ Meaningless on its

¹⁵⁶41 Am. Jur. 2d, Indians, Sec. 25, page 847.

¹⁵⁷91st Cong., 2d Sess., "A Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources", Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary,—"Discharge of the Federal Trust Responsibility to Enforce Claims of Indian Tribes": Case Studies of Bureaucratic Conflict of Interest—Reid Peyton Chambers.

¹⁵⁸APPENDIX, Page 79, footnote 3.

face, that quoted excerpt partakes of meaning when consideration is given to the Executive Order Reservation water rights decreed to them by the Supreme Court.¹⁵⁹ Everything points to the seizure of the main stream decreed rights of the Indians to which reference has been made, for use by the Central Arizona Project. Hence, Justice is confronted with this dilemma as is the Interior Department: Recognize before the Supreme Court that the Indians have rights to the use of water in the main stream and its tributaries and it will in effect be a declaration against interest on the part of those seizing Indian rights, if the Indians seek either the restrain that seizure or remuneration for the loss of those rights.¹⁶⁰

Justice Department's failure to assert in the *Water Division No. 5* and in the *Eagle River Adjudications* the main stream Supreme Court decreed rights of the Fort Mojave, Chemehuevi, Colorado River, Cocopah and Fort Yuma Indian Reservations, can only be viewed as an attempted denial of those rights within the State of Colorado in those Adjudications. Hence, as stated earlier, the cryptic statement from the above quoted footnote to the Court, is a clear violation of the Nation's Trust obligation to the Indians and a breach of responsibility owing to the Supreme Court.¹⁶¹ Gravest aspect of the Justice Department's

¹⁵⁹See Plate 1 and facing page; page 22, footnote 53; See review of Indian and invested rights to the use of water in rivers and their tributaries, page 54 *supra*.

¹⁶⁰Note: A careful investigation during a four (4) year period of the title of Indians with decree rights evidences recognition and confirmation of the Indian title protecting those titles under the Constitution. Hence, the unfortunate—unfitting—course adopted by the Justice Department will not aid its "adversary" role against the Indians.

¹⁶¹See above, a review of rights of the Indians in the main stream and tributaries of the main stream of the Colorado River within Colorado, page 54.

course of conduct is the denial of the main stream Indian Reservations of having their day in court respecting their rights in the main stream of the Colorado River and its tributaries. It is not for the Justice Department to adjudge, declare and determine whether those Indians have rights within the State of Colorado. Only by a final determination of the subject of those rights within the State of Colorado by a court of competent jurisdiction, can those rights be adjudged or denied. It is on that concept of the Nation's obligations to the Indians, in the words of the President in his July 8, 1970 Message, that the United States as Trustee is obligated to advocate the Indian position "* * * without reservation and with the highest degree of diligence and skill."¹⁶²

(b) *Erroneous statements by Justice Department to the Supreme Court respecting American Indian rights to the use of water—refusal of Justice Department to correct erroneous statements*

Indians' *Winters Doctrine* rights to the use of water have been reviewed in detail.¹⁶³ Indian retention of their immemorial rights to the use of water when their interests were conveyed to the United States by treaty or agreement, has been extensively discussed. Indian ownership of the rights of fishery in various streams was adjudged in *Winans*.¹⁶⁴ Ownership of immemorial rights to the use of water retained by the Indians is the Supreme Court ruling in *Winters*. Particular reference has been made to the Supreme Court's statement

¹⁶²Congressional Record, Senate, July 9, 1970, pp. S. 10894, S 10896, Sec. 8, Indian Trust Counsel Authority.

¹⁶³See above, pages 37 et seq.

¹⁶⁴See above, pages 40 et seq.

controlling in that case in regard to the May 1888 agreement pursuant to which the Indians retained—did not grant—their immemorial rights to the use of water.¹⁶⁵ There is a coalescence of the tenets of both *Winans* and *Winters* regarding the retention by the Indians of their immemorial rights to the use of water in *Ahtanum*.¹⁶⁶

Let this fact be emphasized: In each of those cases the title to the rights to the use of water involved was retained by—not granted to—the Indians either expressly or impliedly by the United States. Most assuredly in those cases the rights to the use of water were not reserved for the use of the United States. Yet, in grave error the Justice Department says to the Supreme Court this:

“Reserved rights entitle the United States to use as much water from sources on land withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn
* * * *Winters v. United States*, 207 U.S. 564, 577; *Arizona v. California*, 373 U.S. 546, 598, 601.”¹⁶⁷

Winters, as reviewed above, is a reservation of rights to the use of water by the Indians for *themselves*, not for the “United States to use * * *.” Indeed, the Supreme Court in *Winters* specifically adjudged “The Government is asserting the rights of the Indians.”¹⁶⁸

¹⁶⁵See page 41 et seq. *Winters*: “The [*Winters*] case, as we [the Supreme Court] view it, turns on the agreement of May, 1888, * * *” between the Indians and the United States pursuant to which the Indians retained their immemorial rights to the use of water.

¹⁶⁶See above, page 49 et seq.

¹⁶⁷APPENDIX, Page 20.

¹⁶⁸See above, page 44. Note: *Arizona v. California* likewise cited will be separately considered. It underscores the Justice Department misstatement to the Court.

Errors by the Justice Department to the Supreme Court are reiterated and repeated throughout its *Eagle River Adjudication* brief:

“* * * United States unquestionably has the right to use as much water * * * on lands withdrawn from the public domain * * *”¹⁶⁹

Winters is again cited to support that erroneous statement, as is *Arizona v. California*. Neither decision supports the erroneous concept.

Continuing in error to the Supreme Court, the Justice Department brief in the *Eagle River Adjudication*, says this: “In *Winters* where the United States asserted this right with respect to an Indian reservation * * *”—a quotation stripped from context is set forth.¹⁷⁰ Nature of that quoted error is obvious—“the right” purportedly asserted by the United States was not for its “use” but rather in the explicit words of the Court in *Winters*—the “Government” was asserting the right of the Indians retained by them in their May 1888 agreement with the United States.¹⁷¹

Erroneous statements that the Indian rights were “reserved” by the United States for use of the United States pervade every part of the Petition for Certiorari in the *Eagle River Adjudication* and in its brief in

¹⁶⁹APPENDIX, Page 21.

¹⁷⁰APPENDIX, Page 21. Note: The statement in *Winters* stripped from context by the Justice Department simply declares that the Indian rights retained by them in their May 1888 agreement were impliedly reserved against the State of Montana by the United States when Montana was admitted to the Union. Efforts to blur the main thrust of the *Winters* opinion is unworthy of the high degree of skill and diligence required of the Justice Department. See above, “Immemorial Indian Rights” pages 42 et seq., footnote 99 reviewing full history of *Winters* facts and law.

¹⁷¹See above, page 44 et seq.

that adjudication. Hallmark of that erroneous presentation to the Supreme Court is this statement: "Reserved rights have been defined by this Court as the entitlement of the United States to use as much water from sources on land withdrawn from the public domain * * * *Arizona v. California*, 373 U.S. 546, 595-601."¹⁷² "Reserved rights" have not been defined as the Justice Department states, in *Arizona v. California*,

¹⁷²APPENDIX, Page 2—Petition for Certiorari; Note: Appendix, pages 1, 2-3; 19, 20-21. An all-pervasive error in the Justice Department's presentation to the Supreme Court is this variously repeated statement predicated almost exclusively upon the Indians' *Winters Doctrine* as enunciated by the Supreme Court in the year 1908: " * * * the United States unquestionably has the right to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to water rights vested as of the date of the withdrawal. *Arizona v. California*, 373 U.S. 546, 595-601; *Winters v. United States*, 207 U.S. 564; *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (C.A. 9), certiorari denied, 352 U.S. 988; *United States v. Walker River Irrigation District*, 104 F.2d 334, 336-337, 339-340 (C.A. 9). In *Winters*, where the United States asserted this right with respect to an Indian reservation, this Court said (207 U.S. at 577): [T]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied and could not be. *The United States v. The Rio Grande Ditch and Irrigation Co.*, 174 U.S. 690, 702; *United States v. Winans*, 198 U.S. 371. * * *."

[What the Highest Court actually stated, but Justice Department does not recite: "The Government is asserting the rights of the Indians" (207 U.S. 546, 576 (1908))—not of the United States—vastly different propositions. As is reviewed, *Winters Doctrine* Indian rights to the use of water are under concerted attack because of their great value. If this failure to distinguish Indian private rights from federal reserved rights weakens the principles of the *Winters Doctrine*, the Indians can be more easily deprived of their rights either by legal or illegal seizure.]

Every case cited pertains either exclusively to Indian rights or, as in the case of *Arizona v. California*, predominantly to Indian rights. Yet the Justice Department in error declares the United States "has the right to use" that water. Those are Indian rights, private in character, held in trust by the United States for the benefit of the Indians—not as the Justice Department says, for the "use" of the United States.

or elsewhere. That Court in the last mentioned citation did not declare the "reserved rights" were for the "United States to use." On the first page of the citation in the last quoted excerpt from *Arizona v. California*¹⁷³ the Court specifically referred to the mainstream Congressional and Executive Order Indian Reservations and recited: "The Government, on behalf of five Indian Reservations in Arizona, California and Nevada, asserted rights to water in the mainstream of the Colorado River." Repeatedly the Justice Department is misrepresenting principles enunciated in the decisions adjudging and declaring Indian rights to the use of water citing the 1963 Supreme Court decision of *Arizona v. California*.¹⁷⁴

It is essential carefully to review the precise language of that decision. Reject out of hand the Justice Department assertion that the Court declared Indian rights to the use of water entitled the "United States to use" Indian water. That misstatement cannot be found either expressly or impliedly in *Arizona v. California* or any other decision. In the 1963 decision, having reiterated and reaffirmed the tenets of law upon which the American Indian Rights to the use of water are predicated, as reviewed above,¹⁷⁵ what the Court did say was this: "* * * the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests."¹⁷⁶ That power of the National Government to exercise rights to the use of water, title to which resides in it,

¹⁷³373 U.S. 546, 595 (1963).

¹⁷⁴Id. at 595-601.

¹⁷⁵See *supra*, page 37 et seq.

¹⁷⁶373 U. S. 546, 601 (1963).

in connection with withdrawn public domain—subject to any rights acquired antecedent to withdrawal, says the Court, stems from “* * * the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution.”¹⁷⁷

It is reiterated: There is not a single authority to support the Justice Department statement in regard to either the immemorial rights of the Indians or their invested rights, which entitled “* * * the United States * * * to use * * *” Indian water. That fact gave rise to the demand from one of the Nation’s outstanding law firms in the field of Indian law, to the Justice Department: “We request that in future briefs filed by the United States in these cases the United States call the attention of the Supreme Court to the error in the statements heretofore made in the briefs filed in Docket No. 87 [*Eagle River Adjudication*].”¹⁷⁸ As reviewed above, response to that demand to correct “the error in the statements” to the Supreme Court was the cryptic footnote discussed above, Failure to correct that mistake as requested in the last quoted excerpt, shocks the conscience. For the future not only of the Indian people but for the Nation as a whole, that adamant refusal by the Justice Department correctly to present a legal proposition to the Supreme Court, evidences a sinister amorality due to the inherent conflict of interest within that Department, in which, as the President stated to Congress, “No self-respecting” law firm would engage.¹⁸⁰

¹⁷⁷Arizona v. California, 373 U.S. 546, 597-598 (1963).

¹⁷⁸APPENDIX, Page 73.

¹⁸⁰See above, page 63, “Presidential Condemnation of ‘Inherent Conflict of Interest’ respecting American Indian rights which pervades Justice Department * * *.”

- (c) *Denigration of Indian rights to the use of water would be accomplished by reversal of Indian authorities by needless request to "reaffirm" Winters and other Indian decisions*

Having misstated to the Supreme Court the law respecting Indian rights to the use of water, the Justice Department, without reason or justification, requests the Supreme Court to "reaffirm" the Indians' *Winters Decision* and others. This odd language preceding that needless request in regard to the misstated legal proposition requires specific reference. Justice stated to the Highest Court: "While the Colorado Supreme Court has not specifically denied the existence of federal reserved water rights in Colorado or elsewhere in the West, its statements casting doubt on their existence underline our concern that State courts and State law together would, in fact, eliminate such rights."¹⁹⁰ As emphasized above, the principles of law reiterating and reaffirming the *Winters Doctrine* concepts as related to invested Indian rights to the use of water, were announced by the Court as recently as 1963 in *Arizona v. California*.¹⁹¹ Continuing, the Justice Department, having admitted that the Colorado Supreme Court did not deny the principles of the *Winters Doctrine*¹⁹² but stated in effect—wait until the trial on the merits—says this to the Supreme Court: "For this reason, we urge this Court specifically to reaffirm the principle that the United States has reserved water rights in the western States, including Colorado and other States with similar constitutional provisions."¹⁹³

¹⁹⁰ APPENDIX, Page 22.

¹⁹¹ See above, page 52 "(3) American Indian invested rights to the user of water".

¹⁹² APPENDIX, Page 15.

¹⁹³ APPENDIX, Page 22.

For the Justice Department to invite a challenge to the principles of Indian law in the "state of Colorado and other States with similar constitutional provisions"¹⁹⁴ while denying Indian interests, underscores the gravity of the problems confronting the Indian people by these adjudications. Failure properly to present the nature of the Colorado State police regulations enacted into law by the Colorado legislature is one of the gravest deficiencies of the Justice Department's brief. It is manifest, as will be reviewed, that Colorado's authority to provide methods for persons and corporations within Colorado's jurisdiction for acquiring and having administered their rights to the use of water cannot be construed to apply to Indian rights to the use of water or to subject them to that type of police regulation by the State. Indeed, it would be unconstitutional, as will also be emphasized, to subject the Nation's lands or rights to the use of water to Colorado's police regulations whether they stem from a constitutional proviso of the State or State statutes. Failure of the Justice Department to discuss—indeed, to mention—those basic propositions of law highlights the deficiencies of its presentation to the Supreme Court.

(d) *Denigration of Indian rights by Justice Department greatly aids Reclamation Bureau and other agencies which invade Indian rights to obtain, without legal authority, the water supplies for their projects*

From its inception Interior's Reclamation Bureau has invaded Indian rights to the use of water for its projects. There have been chronicled some of the Reclamation projects which constitute crass seizure of Indian

¹⁹⁴APPENDIX, Page 15.

rights to the use of water.¹⁹⁵ Planned destruction of Pyramid Lake by the Reclamation Bureau is a prime example of that Bureau's wanton invasion of Indian rights. Adamant refusal to protect Indian rights to the use of water by the Justice Department has greatly aided Reclamation in its course of outrageous conduct against the Indians.¹⁹⁶

Most recent events in the cooperation of the Justice Department with Reclamation interests in the seizure of Indian rights to the use of water are reviewed by the above mentioned study of the Senate Committee on the Judiciary.¹⁹⁷ That report reveals the expenditure by Reclamation of millions of dollars in constructing a non-Indian project through the commitment and use of rights to the use of water decreed to the Yakima Indians.¹⁹⁸ A review of the invasion by the Reclamation Bureau of the Pueblo rights to the use of water on the Rio Grande is instructive of the all-pervasive amorality of that Bureau and the Justice Department's cooperation with it.¹⁹⁹

Threat to the rights to the use of water of the Agua Caliente Tribe of Palm Springs, California, by the Corps of Engineers, Department of the Army, is a matter under study at the present time. Invasion of the Indians' rights by the Bureau of Land Management and the Bureau of Sport Fisheries and Wildlife, Department

¹⁹⁵"Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development" * * * 91st Cong. 1st Sess., pp. 493 et seq.

¹⁹⁶Id. at page 497 et seq. "Destruction of Pyramid Lake * * *"

¹⁹⁷A Study of Administrative Conflict of Interest * * * Reid Peyton Chambers, 91st Cong. 2d Sess. page 9.

¹⁹⁸Id. at page 17.

¹⁹⁹Id. at page 18 et seq.

of the Interior, have been analyzed in detail.²⁰⁰ Reclamation's Central Arizona Project being constructed without a water supply, is but another example of a grievous threat to the existence of the Colorado River Indians.²⁰¹

Justice Department attempts—but fails—to represent the American Indians whose rights are seized and encroached upon by the same Federal agencies which it vigorously supports against the Indians.

Retraction by the Justice Department of its misrepresentation to the Supreme Court of its definition of "reserved rights" is essential. Its adamant refusal to act on the basis of its legal and moral obligations constitutes a full disclosure of the inherent conflict of interest which the President condemned, all as has been reviewed.²⁰²

**FAILURE OF THE JUSTICE DEPARTMENT
PROPERLY AND ADEQUATELY TO REPRESENT THE AMERICAN INDIAN PEOPLE
BEFORE THE SUPREME COURT AND IN
THE COURTS BELOW RESPECTING 43
U. S. C. 666²⁰³**

There have been reviewed above salient facts and principles of law relating to the American Indian in-

²⁰⁰Federal Encroachment on Indian Water Rights and the Impairment of Reservation Development, 91st Congress, 1st Session, * * * A Compendium of Papers * * * Joint Economic Committee * * * Vol. 2, p. 497 et seq.

²⁰¹See above page 35.

²⁰²See above pages 63 et seq.

²⁰³See APPENDIX, page 1 et seq.: 43 U.S.C. 666:

Suits for adjudication of water rights. (a) Joinder of United States as defendant; costs—

Consent is given to join the United States as a defendant in

(This footnote is continued on the next page)

terests before the Supreme Court and in the courts below in the two adjudications which are the subject matter of this consideration. Two elements are involved: (1) Indian title to rights to the use of water in the main stream of the Colorado River and its tributaries;²⁰⁴ (2) The precedents, Nationwide in scope, that must be expected by any decision of the Supreme Court whether it accepts or rejects the Justice Department's position in regard to the immunity of "reserved rights" as erroneously defined by that Department to the Supreme Court.²⁰⁵ Cryptic nature of the Justice Department denial of Indian interests to the Supreme Court in its footnote reference, must be condemned.²⁰⁶ Yet, as stated above, the footnote is subject to understanding when read in the light of the all-pervasive inherent conflict of interest which subverts the activities of the Justice Department respecting its responsibilities to the American Indians.²⁰⁷

Comprehension of the threat to the Indian interests requires further analysis of the second sentence of the

any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof in the same manner and to the same extent as a private individual under like circumstances: *Provided*, that no judgment for costs shall be entered against the United States in any such suit.

²⁰⁴Pages 10 et seq.; pages 37 et seq.

²⁰⁵Pages 66 et seq.

²⁰⁶APPENDIX, Page 79, footnote 3.

²⁰⁷APPENDIX, Pages 66 et seq.

cryptic footnote. To the Supreme Court Justice Department says that if it should decide that 43 U.S.C. 666 is applicable to the "federal reserved rights" which that Department has incorrectly defined to include Indian rights "* * * there would remain the further question (not presented by this case) whether" 43 U.S.C. 666 "* * * covers water rights held by the United States in trust for specific Indian tribes—frequently pursuant to treaty—rather than for the benefit of the general public."²⁰⁸ That the Justice Department, Respondents and Amici Curiae proceeded upon the basis that the Indian rights were before the Court until forceful Indian objection was interposed to the Solicitor General, is too clear for doubt—hence, the record can only safely be read as including Indian rights.²⁰⁹ As emphasized, the almost total reliance upon Indian law respecting their rights to the use of water belies the footnote representation to the Supreme Court. Underscoring the tenuousness of the Justice footnote is the repeated erroneous statement that "reserved rights" were defined by the Supreme Court as meaning "the entitlement of the United States [not the Indians] to use water * * *."²¹⁰

Specific reference in the footnote to "treaty" rights in itself constitutes a grave peril to the rights of the American Indians whose rights are predicated upon Executive Orders and Acts of Congress.²¹¹ Increasing that peril to the Indians on the main stream of the

²⁰⁸See above, pages 4, 5 et seq.; pages 79 et seq.

²⁰⁹See above, pages 10 et seq.

²¹⁰See above, pages 7 et seq.; pages 66 et seq.

²¹¹See above analysis of Indian Treaty rights "Immemorial rights" and Indian "Invested rights", pages 37 et seq.; pages 52 et seq.

Colorado River²¹² is the specific declaration of the Supreme Court that those rights stem from Executive Orders and an Act of Congress²¹³—not treaties. It is, moreover, the citation set forth below in which the Justice Department—in error—states the Supreme Court defined “reserved rights” entitles the United States—not the Indians—to “use” the waters thus reserved.²¹⁴ On that background reference will be made to the principles which preserve the immunity of the Indian rights to the use of water from suit, irrespective of the ultimate disposition of the issues presented to the Supreme Court for determination.

(a) *American Indian rights to the use of water are immune from the application of 43 U.S.C. 666*

“These Indian Nations are exempt from suit without Congressional authorization.”²¹⁵ That quoted excerpt from a keystone decision by the Supreme Court in regard to Indian immunity from suit is controlling in regard to 43 U.S.C. 666. The Indian rights to the use of water do not come within the purview of it.

Recently Arizona’s Supreme Court said this specifically in regard to the Colorado River Indian Tribe, which has rights in the main stream of the Colorado River decreed to it by the Supreme Court:²¹⁶

“An impressive body of law has developed recognizing the immunity of Indian tribes from suit.”²¹⁷

²¹²See Plate I and facing sheet.

²¹³Arizona v. California, 373 U. S. 546, 596 et seq. (1963).

²¹⁴APPENDIX, Page 2 “Statement” second full paragraph.

²¹⁵United States v. United States Fidelity Co., 309 U.S. 506, 512 (1939).

²¹⁶See Plate I and facing page; See page 21 et seq.

²¹⁷Morgan v. Colorado River Indian Tribe, an organized Indian Tribe, 103 Ariz. 425; 443 P.2d 421, 423 (1968).

Following a recitation of the numerous authorities on the subject the Arizona court, regarding the Colorado River Indian Tribe, said this:

"It is clear that Congress alone must determine the extent to which immunities afforded trial status are to be withdrawn."²¹⁸

A condition precedent to subjecting Indian rights to the use of water to State court jurisdiction, adjudication, control and administration, which is wholly lacking in 43 U.S.C. 666, is precise action by Congress in regard to those Indian rights. Supporting that conclusion is this statement from a frequently cited decision in regard to the Choctaw Tribe of Indians: "* * * Being a domestic and dependent state, the United States may authorize suit be brought against it. But for obvious reasons, this power has been sparingly exercised. It has been the settled policy of the United States not to authorize such suits except in a few cases, where the subject-matter of the controversy was particularly specified, and was of such a nature that the public interest, as well as the interests of the [Indian] Nation seemed to require the exercise of the jurisdiction. It has been the policy of the United States to place and maintain the Choctaw Nations and the other civilized Indian Nations in the Indian Territory, so far as relates to suits against them, on the plane of independent states."²¹⁹

In declaring the Colorado River Indian Tribe immune from suit the Arizona court cited first and favor-

²¹⁸Morgan v. Colorado River Indian Tribe * * * 103 Ariz. 425; 443 P.2d 421, 424 (1968).

²¹⁹Thebo v. Choctaw Tribe of Indians, 66 Fed. 372, 375 (C.A. 8, 1895).

ably the *Choctaw Case*.²²⁰ Recently the numerous Supreme Court cases and others were cited underscoring the Indian immunity from suit involving the Chippewas: “* * * Indian tribes under the tutelage of the United States are not subject to suit without the consent of Congress * * *.”²²¹ Important to the Colorado Indians is the principle that even where there has been a waiver of Indian immunity, it is strictly construed.²²²

In clear and concise terms the Supreme Court stated the reason for the necessity of a precise and specific waiver of sovereign immunity by the Congress before that Indian immunity could be withdrawn: “It is as though the [Indian] immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did. Possessing this immunity from direct suit, we are of the opinion it possesses a similar immunity from cross-suits.”²²³ The Supreme Court then re-emphasized the need for explicit waiver of immunity by Congress if it was to withdraw the Indian immunity from suit: “The Congress has made provision for cross-suits against the Indian Nations by defendants. This provision, however, is applicable only to ‘any United States court in the Indian Territory.’”²²⁴ As the parties attempting to proceed by court action against the Indians failed to come within the limited scope of that waiver, their suit was

²²⁰*Morgan v. Colorado River Indian Tribe* * * * 103 Ariz. 425; 443 P.2d 421, 423 (1968).

²²¹*Twin City Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (C.A. 8, 1967).

²²²See *Martinez v. Southern Ute Tribe*, 249 F.2d 915 (C.A. 10, 1957).

²²³*United States v. United States Fidelity Co.*, 309 U.S. 506, 512-513 (1939).

²²⁴*Id.*, at 513.

dismissed for want of jurisdiction by the Supreme Court.

A caveat important here was then declared by the Highest Court: "* * * it is said that there was a waiver of immunity by a failure to object to the jurisdiction [in the courts below]." Rejecting that error by Federal lawyers, the Court said this: "It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the Government to suit in any court in the discretion of its responsible officers. This is not permissible."²²⁵ Failure of the Federal officials properly to interpose the objection to suit against the Indians did not preclude raising the issue in the Highest Court: "As no appeal was taken from this Missouri judgment, it is subject to collateral attack only if void. It has heretofore been shown that the suability of the United States and the Indian Nations, whether directly or by cross-action, depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power."²²⁶

Efforts to subject the American Indians to State courts in regard to their rights to the use of water—in that manner to deprive them of their rights—is very much a part of the Indian struggle for survival in Western United States. An authority in point on the subject reviews the efforts and rejects the attempt:

"We next notice the court's conclusion that a 1925 state court adjudication of the respective rights of the white landowners as between them-

²²⁵United States v. United States Fidelity Co., 309 U.S. 506, 513 (1939).

²²⁶Id., at 514.

selves to the 75 percent of the flow of Ahtanum Creek, which had been allotted to them in the 1908 agreement, was a proceeding 'which binds the United States and bars any claim to that portion of the flow.' * * * The United States was not a party to that suit, although as the pretrial order recites, it had knowledge that the adjudication was proceeding and it had an opportunity to appear therein but decided against it. It is too clear to require exposition that the state water right decree could have no effect upon the rights of the United States. Rights reserved by treaties such as this are not subject to appropriation under state law, nor has the state power to dispose of them. *Federal Power Comm'n v. Oregon*, 349 U.S. 435, 444.²²⁷

That 43 U.S.C. 666, whatever it means, relates solely to the rights of the United States held for the public—not the private rights of the Indians held in trust for them—is clear from the express language of that quoted statute. Equally clear is that Congress did not subject the American Indian rights to the police regulations of the States in regard to jurisdiction, adjudication, control and administration.

- (b) *Immunity of American Indian rights to the use of water from State police regulation, jurisdiction, adjudication, control and administration, has not been waived by the Congress under 43 U.S.C. 666 or otherwise*

Deficiencies pervade the Justice Department's presentation in the Supreme Court and the courts below

²²⁷*United States v. Ahtanum Irrigation District*, 236 F.2d 321, 328 (C.A. 9, 1956), Appellees' Cert. denied 352 U.S. 988 (1956); 330 F.2d 897 (1965) 338 F.2d 307; Cert. denied 381 U.S. 924 (1965).

as to the nature of the control purportedly exercised by Colorado over rights to the use of water within the scope of its jurisdiction. It is elemental that Colorado has no proprietary interest in the rights to the use of water in its streams. Indeed, the Colorado courts make no reference to title to rights to the use of water but relate only to "water".²²⁸ It is elemental that "water" is vastly different from the rights to use water.²²⁹ It is, of course, within Colorado's power to declare, as it did, that the principles of the doctrine of prior appropriation would adhere in that State. That declaration was in the proper exercise of the police power of the quasi sovereign.

At an early date Colorado's Supreme Court placed in proper perspective the character of the power which it exercises in regard to rights to the use of water. Respecting its regulations to adjudicate rights, the Colorado court emphasized: "They are in the nature of police regulations to secure the orderly distribution of water for irrigation purposes, * * *."²³⁰ The Supreme Court of the United States in the first *Arizona v. California* decision²³¹ said this in regard to efforts to apply Arizona's police regulations respecting rights to the use of water, to the National Government:

"[Arizona's] statutes prohibit the construction of any dam whatsoever until written approval of plans and specifications shall have been obtained from the State Engineer * * *. The United States has not secured such approval; nor has any ap-

²²⁸See APPENDIX, Page 15.

²²⁹See above, pages 37 et seq.

²³⁰*Nichols v. McIntosh*, 19 Colo. 22; 34 Pac. 278, 280 (1893).

²³¹*Arizona v. California*, 283 U.S. 423, 451 (1930).

plication been made by Wilbur, who is proceeding to construct said dam in complete disregard of this law of Arizona.

"The United States may perform its functions without conforming to the police regulations of a State. * * * Wilbur is under no obligation to submit the plans and specifications to the State Engineer for approval."

It is undeniable that Colorado has never taken any steps to acquire rights to the use of water. From the same source in regard to the immunity of the National Government from Arizona's police regulations, this statement is taken, which fully evidences that Colorado did not acquire rights in the "water" alluded to in its Constitution:

"To appropriate water means *to take* and *divert* a specified quantity thereof and put it *to beneficial use* * * * and, by so doing, to acquire * * * a vested right *to take* and *divert* from the same source, and to use and, consume the same quantity of water annually forever, subject only to the right of prior appropriations. * * * *the perfected vested right to appropriate water flowing* * * * *cannot be acquired without the performance of physical acts through which the water is and will in fact be diverted to beneficial use.*" (Emphasis supplied)²³²

Federal and State courts throughout Western United States on repeated occasions proceeded on the sound legal predicate that State regulations respecting rights to the use of water stem from police power and not

²³²Arizona v. California, 283 U.S. 423, 459 (1930).

from proprietary ownership of the rights. Utah's Supreme Court says this on the subject:

"The statutory declaration that 'the water of all streams and other sources in this State * * * is hereby declared to be the property of the public' *does not vest in the state title or ownership of the water as a proprietor*. It is a community right available to all upon compliance with the law by which that which was once common to all may be brought within the domain of private right to use, or under certain circumstances private and exclusive possession and ownership." (Emphasis supplied)²³³

Bizarre nature of the contention that Colorado could seize by its Constitutional provision all of the Nation's rights to the use of water is demonstrated by the cited authorities. There is the travesty, if the concept is not rejected, of having virtually every jurisdiction in the Colorado River Basin, with the exception of Colorado, denying that the State "owns" in a proprietary sense

²³³Wrathall v. Jackson, 86 Utah 50; 40 P.2d 755, 777 (1935); Vineyard Land & Stock Co. v. District Court of Fourth Judicial District of Nevada, 42 Nev. 1; 171 Pac. 166, 173, 174 (1918); Pacific Live Stock Company v. Lewis, 241 U.S. 440, 448, 449 (1915); Farm Investment Co. v. Carpenter, 9 Wyo. 110; 61 Pac. 258, 260 (1900); Enterprise Irr. Dist. v. Tri-State Land Co., 92 Neb. 121; 138 N.W. 171, 179 (1912); In re Willow Creek, 74 Ore. 592, 144 Pac. 505, 513, 514 (1914); Farmers Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513; 45 Pac. 444, 449 (1896); Farmers' High Line Canal & Reservoir Co., et al., v. Southworth, 13 Colo. 111, 134; 21 Pac. 1028, 1031 (1889); California-Oregon Power Co. v. Beaver Portland Cement Co., 73 F.2d 555, 562, 567 (C.A. 9, 1934); affirmed 295 U.S. 142 (1934). Note: The Supreme Court did not find it necessary to pass on the particular question of the power of the legislature to modify allegedly vested riparian rights but affirmed on other grounds. 3 Kinney on Irrigation and Water Rights, 2d ed., sec. 1341, pp. 2428, 2429. 2 Wiel, Water Rights in the Western States, 3d ed., sec. 1184, p. 1097.

all rights to the use of water of the Colorado River. The late L. Ward Bannister, an outstanding lawyer with respect to rights to the use of water in the State of Colorado, rejected in these terms the fallacy that Colorado could own "the water of the streams within the state" and that the other States did not own "the water": "If this be the only theory of supporting a power in the state to dispose of the waters, only some of the states would have the power, for only some have constitutional character."²³⁴ If Colorado by its Constitutional proviso seized all of the rights to the use of water within that State upon its admission, then the American Indians in the Colorado River Basin are confronted with a catastrophe for, as shown above, seventy percent (70%) of all of the water in the Colorado River drainage rises within that State and the Colorado decision, of course, has statewide application.²³⁵

(1) *Indian immunity from State police control guaranteed by the Constitution*

Immunity of Indians from State police control is basic and has long been recognized by the Supreme Court. On the subject that Court has declared: "Congress has also acted consistently upon the assumption

²³⁴Bannister, *The Question of Federal Disposition of State Waters in Priority States*, 28 Harv. L. Rev. 270, 279 (1915). At p. 283, 287-88; citing the Colorado Constitution, (Colo. Const. art. XVI, sec. 5) Mr. Bannister continued: "Some of the Colorado doctrine common wealths, bent on putting the waters as far as possible beyond the control of the federal government, have adopted constitutional provisions declaring the waters to be the 'property of the public' or the 'property of the state.' Even these provisions which are substantially the same in effect are not considered as vesting the state with any property right in the waters or in their use but affirming sovereign jurisdiction over them."

²³⁵See above, pages 23 et seq.

that the States have no power to regulate the affairs of Indians on a reservation."²³⁶ Continuing, in regard to Indian Immunity from State police regulations the Court declared:

"Significantly, when Congress has wished the States to exercise this power it has expressly granted them the jurisdiction which *Worcester v. Georgia* had denied."²³⁷

It was, of course, in *Worcester v. Georgia*²³⁸ that the Constitutional immunity from State control was established, although in that case it was illegally abridged by the executive branch of the Federal Government.

Great significance must also be ascribed to the *Williams* case from which the preceding quotations have been taken. The northern portion of the Navajo Reservation is almost entirely dependent upon the "water" of the San Juan River which flows out of the State of Colorado.²³⁹ If Colorado has seized the "water" of the San Juan River and its drainage within Colorado, it has clearly violated the Navajo Treaty of 1868.²⁴⁰ That it has not seized those waters by its police regulations is too clear for question. Yet by failing to distinguish Indian rights to the use of water—private in character—from public rights, the Justice Department has imperiled the Navajo and all Indian rights.²⁴¹

²³⁶*Williams v. Lee*, 358 U.S. 217, 220 (1958).

²³⁷*Id.* at 221.

²³⁸31 U.S. 515 (1832).

²³⁹See Plate I.

²⁴⁰15 Stat. 667.

²⁴¹See above, pages 6 et seq.; pages 66 et seq.

- (2) *Failure of Justice Department to challenge as obiter dictum the Colorado decision of Stockman v. Leddy; failure to assert that Colorado's Constitutional proviso is simply a police regulation of "water"—not a claim of proprietary interest*

In declaring Congress had subjected the Nation's rights to the use of water to State control by 43 U.S.C. 666, Colorado's Supreme Court, among other things, said this:

"We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn."²⁴²

That Colorado decision is of transcendent importance to the American Indians and the Nation as a whole.

Failure of the Justice Department to analyze the case of *Stockman v. Leddy*²⁴³ is demonstrative of its unusual approach to the key issues in the two adjudications. Without attempting to review the actual decision, the Justice Department says this:

"The fact that Colorado was admitted into the Union prior to the date of the withdrawal here involved, with a provision in its constitution which the Colorado Supreme Court, in *Stockman v. Leddy*, 55 Colo. 24, construed as an assertion of

²⁴²APPENDIX, Page 15.

²⁴³55 Colo. 24; 129 Pac. 220 (1912).

ownership of all unappropriated waters within its borders, does not preclude ownership by the United States of reserved water rights in Colorado. *Arizona v. California*, 373 U.S. 546, 597-598."²⁴⁴

Facts of *Stockman v. Leddy* are simple. These excerpts are taken from it:

"The immediate object of this action in mandamus by Stockman against the Auditor of State is to compel the latter to issue to him a warrant in the sum of \$55.75 for services which he rendered to a joint legislative committee created by an act of our General Assembly. Session Laws of 1911, p. 671, c. 227. The principal purpose of the action, however, appears to be to determine the constitutionality of the statute."²⁴⁵

Having reviewed the cited Act, the Colorado Supreme Court stated it was "* * * a clear and conspicuous instance of an attempt by the General Assembly to confer executive power upon a collection of its own members." Hence said Colorado's Court: "This is contrary to article 3 of our Constitution * * *" which divided the powers of the State of Colorado into "* * * legislative, executive and judicial * * *" ²⁴⁶—not very unusual. Having thus ruled on the issue before it, Colorado's Supreme Court did not allow payment of the \$55.75. Incidental fact was that the claimed \$55.75 pertained to an authorization by Colorado's legislature to investigate and take action in connection with the activities of the "* * * Reclamation Service and the

²⁴⁴APPENDIX, Page 22.

²⁴⁵*Stockman v. Leddy*, 55 Colo. 24; 129 Pac. 220, 221 (1912)

²⁴⁶*Stockman v. Leddy*, 55 Colo. 24; 129 Pac. 220, 223 (1912).

Forest Service of the Federal Government" as those activities related to the "* * * right of this state to control the distribution of the waters * * *" within the State.²⁴⁷

Stockman v. Leddy reviews the Constitutional provision of the State. It quotes this excerpt from the provision: "The water of every natural stream, not heretofore appropriated, within the state of Colorado is hereby declared to be the property of the public * * *". It is to be observed, as reviewed in detail above, that the Constitutional proviso relates to "water" dedicated to the "public". On that background the court stated "* * * the federal government has, as we have just shown, given its consent that the waters of the natural streams of this state belong to the people, to the state, in its sovereign capacity, and that this right to their distribution and control within its borders is free from interference by any other sovereignty."²⁴⁸ Fundamentally the Supreme Court of Colorado applied the basic precepts of the law reviewed in detail above—that the States under their police power undoubtedly have authority to provide for the acquisition of rights in and the distribution of the waters under their jurisdiction. The Supreme Court of Colorado did not state that Colorado owned rights to the use of water—the usufructuary right which is an interest in real property²⁴⁹—in a proprietary sense. It is clear that Colo-

²⁴⁷Id. at 221.

²⁴⁸Id. at 222.

²⁴⁹See above, page 37. Utah's Supreme Court stated that elemental proposition very well in these terms: "Water flowing in a natural stream or in a ditch is not subject to ownership so far as the corpus of the water is concerned." *Bear Lake & River Waterworks Irr. Co. v. Ogden*, 8 Utah 494, 33 Pac. 135 (1893). See 1 Wiel, *Water Rights in the Western States*, 3d ed. Secs. 18-19.

Colorado's constitutional proviso was simply an exercise of its police power regarding matters within the purview of its authority. Hence there is no basic conflict with the power of the Federal Government to exercise its rights to the use of water in Colorado independent of State interference.²⁵⁰

Failure to raise the issue of the nature of Colorado's police regulation interest in the "water" within that State is one of the most grave deficiencies in the Justice Department's conduct of the entire proceeding from the lowest to the Highest courts. Attendant upon that total inadequacy of presentation is the grave Constitutional questions next to be considered.

(3) *Congress did not—could not—delegate its Constitutional Trust obligation to American Indians to States by 43 U.S.C. 666*

Congress, as stated, did not subject American Indian rights to the use of water by its enactment of 43 U.S.C. 666, to State control.²⁵¹ As the President in his July 8, 1970, message to Congress recognized, those rights to the use of water are protected by the Trust responsibility this Nation owes to the Indians.²⁵² Indeed, Congress could not abrogate this Nation's Trust obligation respecting Indian rights to the use of water for that obligation was delegated to and accepted by the Nation under the Constitution.²⁵³ It is, of course,

²⁵⁰See above, page 68—"Immunity of American Indian rights to the use of water from State police regulation, jurisdiction, adjudication, control and administration, has not been waived by the Congress under 43 U.S.C. 666 or otherwise.

²⁵¹See above, page 86, et seq.

²⁵²See above, pages 63 et seq.

²⁵³See Constitution of the United States 1787, Art. I, Sec. 8, Cl. 3; See Federal Encroachment on Indian Water Rights and
(This footnote is continued on the next page)

an elemental proposition of law that Congress cannot delegate the Constitutional powers or responsibilities.²⁵⁴ That Congress did not purport to do so is clear from the explicit language of 43 U.S.C. 666.

Omitting reference to the Constitutional prohibition against the delegation of Trust obligation by the Congress, is but one aspect of the Justice Department's grave damage to the Indians by that Department's failure to bring to the Court's attention the Indian rights in the Colorado River and its tributaries while relying almost exclusively upon Indian law relative to the issues before the Court. Any attempt to assert that 43 U.S.C. 666 is applicable to the Indian rights to the use of water must be barred by the principle that the Congress did not intend to and could not delegate to the States the power to exercise jurisdiction over Indian rights.

(4) *Failure by Justice Department to raise most elemental proposition of statutory construction —43 U.S.C. 666 does not and could not have retrospective effect subjecting the Nation's or the Indians' rights to decrees to which it was not and could not be made a party*

Congress did not intend 43 U.S.C. 666 to have retrospective effect. Yet the entire course of conduct by the Justice Department in the proceeding in the Supreme Court and those in the courts below, proceeds

the Impairment of Reservation Development, 91st Congress, 1st Session, * * * A Compendium of Papers * * * Joint Economic Committee * * * Vol. 2, pages 477 et seq.

²⁵⁴See 79 L.Ed. 476; *Schechter Corp. v. United States*, 295 U.S. 495, 537 (1934); *Field v. Clark*, 143 U.S. 649, 692 (1891); *Butte City Water Company v. Baker*, 196 U.S. 119, 126 (1905); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 163, 164 (1919).

in disregard of those basic tenets of the law—tenets of the law which are of necessity controlling.

Nature of the *Eagle River Adjudication* and *Water Division No. 5 Adjudication* as they pertain to the rights of the American Indians and the Nation as a whole in the main stream of the Colorado River and its tributaries, has not been clearly stated. Facts respecting those proceedings are vital to a correct evaluation of the course that has been followed by the Justice Department in them. Regarding the *Eagle River Adjudication*, Colorado's Supreme Court said this: "There have been a number of previous adjudications in this water district. The decree in the original adjudication was

entered eighty years ago and the last one was entered on February 21, 1966. The United States was not a party in any of these earlier proceedings."²⁵⁵

Upshot of applying 43 U.S.C. 666 to decrees entered eighty years ago is to attempt an erroneous interpretation of that statute as being retrospective in operation. That attempt to apply the law to Colorado's State decree dating back eighty years must be contemplated in the light of these additional rulings by the Colorado Court:

"We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights."²⁵⁶

²⁵⁵APPENDIX, Page 12.

²⁵⁶APPENDIX, Pages 12, 15.

Continuing, the Colorado Court stated in regard to its determination that 43 U.S.C. 666 subverted the Nation's rights to decrees eighty years old:

"* * * These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn."²⁵⁷

Later in its decision the Supreme Court of Colorado ruled, in a purely advisory feature of its opinion—advisory because the issues were not before it as revealed by the last quoted excerpts:

"The fact that our statutes do not provide for the adjudication of the rights of the United States with priorities prior to the date of later decrees does not mean that our district courts in a water adjudication cannot determine the rights of the United States in relation to decreed water rights.
* * * We hold that the Constitution, without the need of any statute, grants jurisdiction of the subject matter under consideration."²⁵⁸

Substance of that statement—albeit advisory and in total error—is that 43 U.S.C. 666 subjected the United States to proceedings, facts and law, which were tried upwards to one hundred years ago. That the United States would have no right to cross-examine witnesses a long time dead; to appeal from judicial errors which probably cried out for reversal, demonstrates the fallacy of the advisory opinion. Let this fact be emphasized: Congress did not contemplate that type of confiscation of the Nation's rights to the use of water when it enacted 43 U.S.C. 666.

²⁵⁷ APPENDIX, Pages 12, 15.

²⁵⁸ APPENDIX, Pages 12, 17.

Let this fact be likewise emphasized: American Indians in the Colorado River Basin cannot survive that type of conduct in the proceedings within the State of Colorado for, as reviewed, Colorado constitutes their primary source of water supply.²⁵⁹

From the express language of 43 U.S.C. 666²⁶⁰ it is evident that it is prospective, not retroactive, in its operation. It is, of course, elementary that retrospective statutes exist only when Congress expressly declares that type of operation of them, and they cannot then invade property rights, particularly those of the American Indians whose rights are held in trust by the United States.

It is a basic precept of the law governing statutory construction that enactments will not be accorded retroactive application unless there has been a clear mandate of the legislative body directing the law be applied in that manner. A review of the express language of 43 U.S.C. 666 discloses no such mandate from Congress.

"Legislative enactments will not be construed as retrospective in their operation, even when permissible, unless it is clear they were intended to do so. This rule ought especially to be adhered to when such a construction will alter the pre-existing situation of parties or will affect or interfere with their antecedent rights. It is founded on the soundest principles of public policy and its reason is manifest."²⁶¹

²⁵⁹See above, page 23.

²⁶⁰APPENDIX, Page 1.

²⁶¹United States v. McPhee, 51 Colo. 425, 431; 118 Pac. 996 (1911).

Colorado's Supreme Court has stated:

"One of the contentions of the city is that this [law] cannot have a retroactive effect unless there is an express declaration in the statute so providing. We think that contention is sound. * * * It is a fundamental rule, supported by numerous decisions, that statutes are not to be construed as having a retroactive effect unless the purpose and intention of the legislature to give them a retroactive effect clearly appears."²⁶²

Adopting virtually the same language as the State court, the Supreme Court of the United States recently declared: "Retroactivity, even where permissible, is not favored, except upon the clearest mandate."²⁶³ That Court has likewise stated: "Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.'"²⁶⁴

Citing the Colorado Constitution, Sutherland on *Statutory Construction* says this: "Because of the intuitive belief that there is something inherently bad in retroactive legislation, some states [including Colorado] have adopted express constitutional provisions against retroactive laws."²⁶⁵

²⁶²Denver v. Armstrong, 105 Colo. 290, 292; 97 P.2d 448 (1939).

²⁶³Claridge Apartments Co. v. Commissioner, 323 U.S. 141, 164 (1944).

²⁶⁴Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 618 (1944).

²⁶⁵2 Sutherland, *Statutory Construction*, 3rd ed., Horack, Sec. 2204, p. 119, citing Colorado Constitution, Art. II, Sec. 11:

Ex post facto laws.—No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, or making any irrevocable grant of special privileges, franchises or immunities, shall be passed by the general assembly.

Dissipation of invaluable rights to the use of water either those of the American Indians held in trust for them, or those of the Nation as a whole, was not intended by the Congress when it enacted 43 U.S.C. 666. Compliance with Colorado law would inevitably have that effect. As stated above, adjudication decrees were entered eighty years ago in the *Eagle River Adjudication*. That fact is, of course, equally applicable to the decrees in the *Water Division No. 5 Adjudication* which embraces the former adjudication.²⁶⁶ Most recent decree on the Eagle River, as Colorado's Supreme Court stated, was February 16, 1966.²⁶⁷ Under Colorado law the American Indians, if 43 U.S.C. 666 is applicable to them—which it is not—would lose priorities antecedent to one day subsequent to February 16, 1966—an irreparable damage to every Indian dependent upon waters arising in Colorado.²⁶⁸

Loss of priority in a river so grievously over-appropriated and contaminated as the Colorado, is tantamount to losing irreplaceable property rights. Priorities have long been recognized by Colorado's Supreme Court as invaluable property interests: “* * * this court has repeatedly held that priorities of right to the use of water are property rights. Such is the settled doctrine in this state. * * *

Property rights in water consist not alone in the amount of the appropriation, but also in the priority of the appropriation. It often happens that the chief value of an appropriation consists in its priority over other appropriations from the same

²⁶⁶See above, pages 1 et seq.

²⁶⁷APPENDIX, Page 12.

²⁶⁸See Colo. Rev. Stat. 1963, Perm. Cum. Supp. 1969, Sec. 148-21-22. Substance of that law was applicable prior to the 1969 amendment—See APPENDIX pages 76-77.

natural stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right; * * *."²⁶⁹

Emphasizing the sanctity of a priority to rights to the use of water the Colorado court stated: "*A priority of right to the use of water, being property, is protected by our constitution so that no person can be deprived of it without 'due process of law'*".²⁷⁰ (Emphasis supplied) Underscoring the principle that the priority to which a right to the use of water is entitled, is property, the Supreme Court of Colorado has likewise stated:

"It is elementary learning in Colorado that a water priority is a property right—not a mere revocable privilege; that it is not a fixed appurtenance; that the right to change its place of use and the point of diversion is an inherent property right, not conferred by our remedial statute, but pre-existing as an incident of ownership, and always enforceable so long as the vested rights of others are not injuriously affected."²⁷¹

The basic principles in regard to the real property nature of a priority to the use of water from a stream is adhered to throughout the arid and semiarid West.²⁷² A different rule would be suicidal where water is the very essence of life itself.²⁷³

²⁶⁹Nichols v. McIntosh, 19 Colo. 22; 34 Pac. 278, 280 (1893).

²⁷⁰Nichols v. McIntosh, 19 Colo. 22; 34 Pac. 278, 280 (1893).

²⁷¹Brighton Ditch Co., et al. v. City of Englewood, 124 Colo. 366, 237 P.2d 116, 120 (1951).

²⁷²Hutchins, The California Law of Water Rights, "Property Characteristic" pp. 120 et seq.

²⁷³Vonberg v. Farmers Irr. Dist., 132 Nebr. 12; 270 N.W. 835 (1937); Whitmore v. Murray City, 107 Utah 445; 154 P.2d 748, 751 (1944);

For summary on the subject see 1 Wiel, Water Rights in the Western States, 3d ed., Chap. 14, pp. 307 et seq.

Denial of the American Indians of their right to be heard before the Supreme Court in the *Eagle River Adjudication and Water Division No. 5 Adjudication*, in the light of their rights to the use of water within the State of Colorado, is tantamount to the destruction of the American Indians residing in the Colorado River Basin.²⁷⁴ Failure of the Justice Department adequately and properly to represent the American Indians, indeed, all of the people of the Nation, in the above mentioned proceedings, in regard to (i) the clear import of the Colorado Constitution which only claims regulatory authority, not proprietary title, in the "water within its boundaries"; (ii) the prospective, not retrospective, nature of 43 U.S.C. 666, whatever other force it may have, is, as stated, simply reflective of the "inherent conflict of interest" within that Department so severely condemned by the President in his July 8, 1970, Message to Congress. Conduct—offers to bargain—by the Justice Department in the Supreme Court and the courts below, in regard to the meaning and application of 43 U.S.C. 666 likewise falls far short of the President's demand that the Justice Department representing the Trustee United States, has the "legal obligation to advance the interests" of the American Indians "without reservation and with the highest degree of diligence and skill."²⁷⁵ That conduct will now be reviewed.

²⁷⁴See above, pp. 37 et seq.; pp. 52 et seq.

²⁷⁵Congressional Record, Senate, July 9, 1970, pp. S 10894, S 10896, Sec. 8, Indian Trust Counsel Authority.

- (5) *Failure of Justice Department to fulfill obligations by (i) offers to appear as plaintiff in State court proceedings asserting minuscule claims; (ii) to subvert on the basis of State lines, the Nation's rights to the use of water*²⁷⁶

Seeking to placate the powerful forces which desire to take from the people of the United States rights to the use of water in Colorado, the Justice Department has offered to bargain with those forces.²⁷⁷ Disaster will be visited upon the American Indians in the Colorado River Basin by the voluntary submission of the Nation's rights to the police regulations of Colorado in much the same degree as they will by that Department's failure properly or adequately to represent the Nation under 43 U.S.C. 666, all as reviewed above. Reject out of hand any assertion by the Justice Department that American Indian rights are not affected; subsequently may be adjudicated in other, later proceedings. Utah's Supreme Court contemptuously said this to the Justice Department's attempts to piecemeal Federally claimed rights, some of which were before it: "The United States accepts the decree as entered, but urges that in addition to the specific water rights it was awarded, the court should have recognized additional but unspecified water rights which may exist by virtue of Federal withdrawal of public lands and which the government may require for use in the future.

* * *

"It is thus magananimously conceded that private individuals have acquired their water rights adjudicated in this proceeding, but it is contended

²⁷⁶See above, pages 6 et seq.

²⁷⁷See above, page 8, paragraph (iii); APPENDIX, Pages 10-11.

that they must always be inferior and subordinate to rights which the government might decide at a later time to assert.

* * *

*"It is our opinion that the United States, having become a party seeking adjudication of its rights in this proceeding, wherein the court had jurisdiction of the subject matter and the parties, is bound by the judgment to the same extent as any other party. * * *"* (Emphasis supplied)²⁷⁸

In simple terms, the Justice Department is now and for many years, through failure properly to represent the Nation in litigation involving rights to the use of water—not only the rights of the American Indians—is causing the people of this country to lose invaluable, irreplaceable rights in the streams within its forest, park and recreational areas. This matter has previously been emphasized. In a memorandum dated January 28, 1964, entitled "Abridgment and Loss of Indians' Winters Doctrine Rights and Those of the Nation as a Whole" there was directed to the then Assistant Attorney General of the Lands Division, Department of Justice, a full review of the failure of the Justice Department adequately and properly to represent the United States in litigation involving the Indians' and the Nation's rights to the use of water. The principles reviewed there are equally applicable to the present phase of this consideration.

²⁷⁸In re Green River Adjudication v. United States of America, 17 Utah 2d 50; 404 P.2d 251, 252 (1965).

Voluntarily to submit to the police regulations under the circumstances offered—indeed, under any circumstances—is tantamount, as the Utah court explicitly ruled, to an outright abandonment of all rights including American Indian rights which are not asserted.

Bargaining on the basis that the Justice Department would submit, under 43 U.S.C. 666, to State control on a statewide basis, is clearly violative of the express language of part (1) of the Act, and the cases interpreting that Act.²⁷⁹ Under no circumstances should the American Indians agree that the Colorado River, short of water and polluted, should be segments by the laws of the seven Colorado River Basin States. There is no more rapid means of perpetrating another—perhaps last—outrage against the American Indians in that Basin and throughout Western United States.

DISMISSAL BY THE SUPREME COURT OF
THE *EAGLE RIVER ADJUDICATION* AND
THE *WATER DIVISION NO. 5 ADJUDICA-
TION* SHOULD ENSUE—PRINCIPAL PAR-
TIES ALREADY BOUND BY A FEDERAL
DISTRICT COURT DECREE—THE UNITED
STATES IS NOT A NECESSARY PARTY

- (a) *Failure of Justice Department to bring to the Supreme Court's attention a Federal Decree encompassing all of the drainage area of the main stream of the Colorado River in the State of Colorado*²⁸⁰

Incredible aspect of the Justice Department's conduct in the Supreme Court and in the Colorado courts

²⁷⁹See above, page 8, paragraph (iv); See pages 66 et seq.
²⁸⁰Civil Nos. 2782, 5016, 5017

In the United States District Court for the District of Colorado
(This footnote is continued on the next page)

is its failure to refer to the Final Decree and Final Judgment dated October 12, 1955, by the United States District Court for the District of Colorado. Parties to that Final Decree are most significant in the light of the present proceedings before the Supreme Court. As will be observed, they include: The United States of America v. [1] Respondent in Cases No. 87 and 812, The Colorado River Water Conservation District; [2] Respondent in Case No. 87, The City and County of Denver, a Municipal Corporation. All-encompassing

The United States of America, Plaintiff)	
v.)	
Northern Colorado Water Conservancy District, a)	
Quasi-Municipal Corporation of the State of)	
Colorado)	
The Colorado River Water Conservation District, a)	
Quasi-Municipal Corporation of the State of)	
Colorado;)	
The Palisade Irrigation District, a Quasi-Municipal)	Civil
Corporation of the State of Colorado;)	No. 2782
The City and County of Denver, a Municipal Cor-)	
poration;)	
The City of Englewood, a Municipal Corporation;)	
The City of Colorado Springs, a Municipal Corpo-)	
ration)	
The South Platte Water Users Association, a Public)	
Corporation of the State of Colorado;)	
Defendtns)	
Petitioners: Colorado River Water Conservation)	
District, The Grand Valley Water Users Associa-)	
tion, The Orchard Mesa Irrigation District, Palisade)	Civil
Irrigation District, and Grand Valley Irriga-)	No. 5016
tion Company; In the Matter of the Adjudication)	
of Priorities of Water Rights in Water District)	
No. 36 for Purposes of Irrigation)	
Petitioners: Colorado River Water Conservation)	
District, The Grand Valley Water Users Asso-)	
ciation, The Orchard Mesa Irrigation District,)	
Palisade Irrigation District, and Grand Valley)	Civil
Irrigation Company; In the Matter of the Adjudi-)	No. 5017
cation of Priorities of Water Rights in Water)	
District No. 36 for Purposes Other Than Irriga-)	
tion)	
Amendments to Judgment and Decree, if any.		

nature of that Final Decree in regard to the main stream drainage area of the Colorado River can be ascertained from a review of Senate Document No. 80, 75th Congress, which that Decree was entered to enforce. Plate II refers to the flow requirements under that Senate Document and Final Decree, at Shoshone and at the head of Grand Valley. If the Justice Department has abandoned that Final Decree against the Respondents, so important to the entire drainage area of the Colorado River, the Supreme Court of the United States must be advised. If the Justice Department has not abandoned that Final Decree, then it behooves that Department to inform the Supreme Court of it, and how it can be ignored in the two Adjudications under review.

Included with specificity in that Federal Court Decree are rights to the use of water of the Respondent City and County of Denver and whatever may be the interest of Respondent City and County of Denver and whatever may be the interest of Respondent Colorado River Water Conservation District. It pertained with specificity and with particularity to rights to the use of water in Colorado Water Districts No. 36 and 51. Yet the Justice Department recites this to the Supreme Court:²⁸¹

²⁸¹APPENDIX, Page 11.

"The United States, however, has recently been served in three additional supplemental adjudications:

- (1) W.D. 36, Dist. Ct., Summit Co., Civil No. 2371;
- (2) W.D. 51, Dist. Ct., Grand Co., Civil No. 1768; and
- (3) W.D. 52, Dist. Ct., Eagle Co., Civil No. 1548."

The Supreme Court must be advised as to the Justice Department's position respecting the Federally decreed rights of the United States as they pertain to those Districts. Does the Justice Department intend to subject part of the rights to the State court as a plaintiff as it has suggested, and have the vast and all-inclusive rights embraced in the 1955 Final Decree administered under the Federal Court's jurisdiction? Total confusion is no predicate for presenting to this Nation's Highest Court the all-important question of the applicability of 43 U.S.C. 666 as it pertains to the Colorado River and its tributaries within the State of Colorado. Yet that is the precise nature of the proceedings based upon the existing Federal decree binding on the principal Respondents before the Supreme Court.

Bizarre nature of the present status of the issues, in the light of the 1955 Federal Final Decree encompassing Water Division No. 5, including the *Eagle River Adjudication*, cannot be resolved from the record before that Court. Yet it is imperative that those issues be resolved if a total travesty is to be avoided. Any other course is unfitting for all parties concerned. For reasons reviewed in depth, the American Indians in the Colorado River Basin have a most vital and basic interest as their rights are gravely imperiled due to the fact that a large proportion of the entire flow of the Colorado River is involved.²⁸²

(1) *Odd course adopted by Respondents*

Respondent The Colorado River Water Conservation District is the only Respondent to file a brief in the *Water Division No. 5 Adjudication*.²⁸³ That is odd be-

²⁸²See above, pages 23 et seq.

²⁸³APPENDIX, Pages 86 et seq.

cause as reviewed above, *Water Division No. 5* includes the Eagle River. It is odd but in keeping with the general course of the proceedings. Does Denver contend there is a conflict with the United States under the old Colorado law—the *Eagle River Adjudication*—but no conflict with the United States under the new law—the *Water Division No. 5 Adjudication*; which includes the *Eagle River Adjudication*? How can the City and County of Denver, if it has a true interest in the *Eagle River Adjudication*, refrain from participating in *Water Division No. 5 Adjudication*? Perhaps the explanation is contained in the vagaries of the alleged claims of the City and County of Denver as spelled out in this footnote in the Respondent's brief in the *Eagle River Adjudication*:

"The Colorado River Water Conservation District appeared on behalf of and in support of the action of the respondent court denying the motion of the United States to dismiss. Other respondents below were parties in the adjudication proceeding. The City and County of Denver is the largest single user of water in the State and a substantial part of its water supply will come from the Eagle River system. The Central Colorado Water Conservancy District is a claimant of water in that area and New Jersey Zinc Company is also an owner, user and claimant of water in the area. All are affected by the rights the United States indicates it would claim."²⁸⁴

There is no assertion there of a conflict between the National Government and any of the Respondents. It is, indeed, denied that there is a conflict or a justiciable

²⁸⁴APPENDIX, Page 25, footnote 5.

issue before the Supreme Court, if the true facts were fully disclosed.

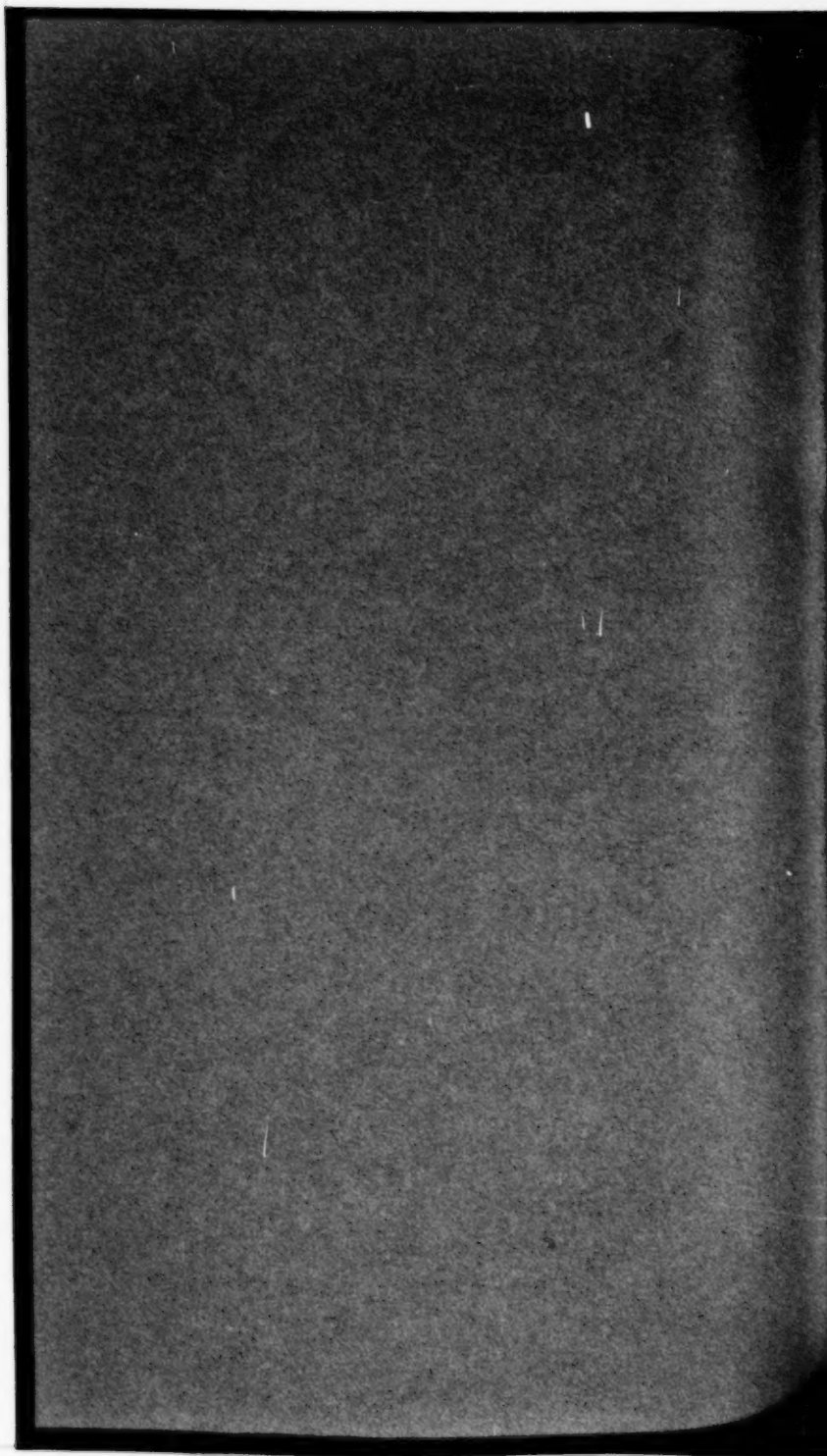
(2) *The United States is not a necessary party*

As reviewed above, the United States, based on the record, is not a necessary party to the *Adjudications*—43 U.S.C. 666 explicitly requires that, prior to joinder, the United States must be a necessary party.²⁸⁵ Inquiry in that connection must be raised as to the nature of the claim of the Colorado River Water Conservation District. What are its powers? What are its claims? Are they adverse to the United States? Similarly, there appears to be no basis whatever for a claim on behalf of the Respondent Central Colorado Water Conservancy District. Again, from the record, there is no basis for determining what that claim may be. That conclusion is manifest from the immediately preceding excerpt from Respondent's *Eagle River Adjudication* brief. As emphasized, only one of the Respondents filed a brief in *Water Division No. 5 Adjudication*. These inquiries must be responded to for there probably have never been more important issues before the Supreme Court in regard to Western water rights. Absent proof from the record that the United States is a necessary party, demand must be made for dismissal of the proceedings.

/s/ William H. Veeder
William H. Veeder
Water Conservation and
Utilization Specialist

March 23, 1971

²⁸⁵See above, page 2.



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APPENDIX

Office Supreme Court U.S.

FILED

Feb 12 1970

John F. Davis, Clerk

In the Supreme Court of the United States, October Term, ~~1969~~ [Now October Term, 1970] No. ~~1178~~ [Now No. 87]

United States, Petitioner v. The District Court in and for the County of Eagle and State of Colorado.

Petition For A Writ of Certiorari To The Supreme Court Of The State Of Colorado

* * * * *

QUESTIONS PRESENTED

1. Whether in enacting 43 U.S.C. 666 Congress intended to consent to suits against the United States for adjudication of its reserved water rights not predicated on State law.

2. Whether the congressional consent to suits against the United States "for adjudication of rights to the use of water of a river system" extends to a supplemental adjudication proceeding in one of some 70 water districts in Colorado which encompasses only a tributary of the Colorado River.

STATUTE INVOLVED

43 U.S.C. 666 (Act of July 10, 1952, 66 Stat. 560) provides:

Suits for adjudication of water rights. (a) Joinder of United States as defendant; costs—

Consent is given to join the United States as a defendant in any suit (1) for the adjudication

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of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

STATEMENT

The United States was joined as a defendant to a supplemental water adjudication proceeding for Water District 37 in the Eagle County District Court in Colorado. Water District 37 is one of 70 water districts in Colorado, and encompasses "all lands lying in the state of Colorado irrigated by water taken from the Eagle river and its tributaries" (Colo. Rev. Stat., 148-13-38 (1963)). The Eagle River is a tributary of the Colorado River.

The United States claims two types of water rights in Water District 37: *appropriative* rights acquired pursuant to State law, and *reserved* rights based on federal law, resulting principally from withdrawals of land

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from the public domain. Reserved rights have been defined by this Court as the entitlement of the United States to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to water rights vested as of the date of the withdrawal. *Arizona v. California*, 373 U.S. 546, 595-601. Most of the reserved rights claimed by the United States in Water District 37 are for the White River National Forest, which was withdrawn from the public domain by Presidential Proclamation on August 25, 1905 (34 Stat. 3144).

In response to its joinder as a defendant in the State court proceeding,² the United States moved for dismissal as to it, on the ground of lack of jurisdiction. When that motion was denied by the district court, the United States applied to the Colorado Supreme Court for a writ of prohibition. The first ground of that application was that 43 U.S.C. 666 consents only to a suit wherein the rights of all water users within a river system are before the court, and that a supplemental adjudication proceeding in Water District 37 is not such a suit because Water District 37 does not embrace an entire river system. Moreover, the United States contended that, since the jurisdiction of Colorado district courts is limited by State law to the adjudication of water rights arising under Colorado law (appropriative rights), the district court could not adjudicate water rights of the United States based on reservations of the public domain (App. 22).³

The Colorado Supreme Court in an *en banc* opinion concluded that the United States was subject to the

²This footnote omitted here.

³This footnote omitted here.

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jurisdiction of the district court, and accordingly discharged its rule to show cause. The grounds for its decision were that (1) the adjudication proceeding in Water District 37 is an "adjudication of rights to the use of water of a river system" within the meaning of 43 U.S.C. 666; (2) the United States has consented, by Section 666, to adjudication of its reserved rights; and (3) the Colorado district courts have plenary jurisdiction, independent of State statute, to adjudicate rights of the United States based both on appropriations under State law and on withdrawals from the public domain, and to bring all parties necessary to such an adjudication before the Court (App. 31, 33, 45). The court reserved decision on whether the United States was bound by prior adjudications in Water District 37 to which it was not a party (App. 40).

While the court did not expressly decide that the United States has no reserved water rights in Colorado,⁴ the thrust of its opinion is that the United States has no water rights in Colorado except those arising under State law. The court said the cases cited by the United States in support of its claimed reserved rights (*Arizona v. California*, 373 U.S. 546; *Winters v. United States*, 207 U.S. 564; *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690; and *Federal Power Commission v. Oregon*, 349 U.S. 435) were not determinative (App. 37-40). It suggested that a decision that the United States has reserved rights in Colorado would require the overruling of *Stockman v. Leddy*, 55 Colo. 24, where it had said that the United States, by admitting Colorado into the Union with a provision in its constitution declaring unappropriated waters of

⁴This footnote omitted here.

Appendix Page 5

streams within its borders to be the property of, and subject to appropriation by, the people of Colorado,⁵ had lost any right to assert thereafter water rights in Colorado except those acquired by appropriation pursuant to State law (App. 40).

* * * * *

REASONS FOR GRANTING THE WRIT

The decision below poses substantial hazards to the effective utilization of federal lands in the West. The net effect of that decision may well be to deprive the United States of valuable water rights for use in connection with the development of the public domain. The United States owns approximately 731,000,000 acres of land in the 17 contiguous western States and Alaska. U. S. Dept. of Interior, *Public Land Statistics*, p. 11 (1966). Water is obviously essential to the utilization and administration of land in these arid and semi-arid States, as well as to a variety of other government projects and programs. In this regard, the United States depends both on water rights acquired pursuant to State law and on reserved rights based on withdrawals from the public domain. Until now the validity of the latter source has scarcely been open to question. See, e.g., *Winters v. United States*, 207 U.S. 564, 577; *Arizona v. California*, 373 U.S. 546, 598, 601.

The decision below threatens the inviolability of the federal government's reserved water rights. Courts in other western States may well be guided by the example set in this regard by the Colorado courts. If, as the decision below portends, the rights of the United States to use the water on its public lands which have been

⁵This footnote omitted here.

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withdrawn for various purposes are to be subjected to the vagaries of inconsistent State laws, the implications for any public-oriented program of conservation and land development are indeed serious. The magnitude of the problem is indicated by the fact that about 443,000,000 acres have been withdrawn from the public domain for use as Indian reservations, national parks, national forests, national recreation areas, national monuments, etc.⁷ It is not an exaggeration to suggest that the decision below raises serious questions about the nature and scope of the federal government's water rights on all these public lands.

The appropriation system of water law followed by Colorado is prevalent in the western States.⁸ It is fundamental to this system of water law that the rights of users of water from the same source are carefully described as to priorities, amounts and uses in adjudication proceedings. The only statute by which the United States has given its consent to be made a party to such adjudication proceedings is 43 U.S.C. 666. For that reason, the reach of the consent to suit given by the United States in this statute, which has never been definitively construed by this Court on this point, is of great importance. This is particularly so at a time when increasing demands on the Nation's limited water supplies by a rapidly expanding population make it certain that the problems arising under the statute, such as those involved in this litigation, will be recurring ones.

* * * * *

The appropriation system of water law, upon which the laws of the western States are based, is essentially

⁷This footnote omitted here.

⁸This footnote omitted here.

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different from the concept of reserved water rights. Under Colorado law, to "adjudicate" means essentially to fix the amount and priority date of a water right by determining when, and in what quantity, water was diverted and applied to a beneficial use (Colo. Rev. Stat., 148-9-11, 13 (1963)). Such water rights are subject to loss through abandonment, and thus have characteristics that are incompatible with reserved rights, which arise automatically when lands are withdrawn from the public domain, have priority as of the dates of such withdrawals, and apply to future as well as existing uses. The Colorado Supreme Court's suggestion that the Colorado constitution precludes ownership by the United States of reserved rights in Colorado¹¹ is illustrative of the potential difficulties. But, as we have already noted, the United States unquestionably has the right to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn subject only to water rights vested as of the date of withdrawal, and the suggestion thus conflicts with decisions of this Court. *Arizona v. California*, *supra*, 373 U.S. at 595-601; *Winters v. United States*, *supra*, 207 U.S. 564; see also *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (C.A. 9); *Burley v. United States*, 179 Fed. 1, 12-13 (C.A. 9).¹²

* * * * *

2. Similarly, the court below erred in holding that the United States may be joined under 43 U.S.C. 666 in a State court proceeding for the adjudication of water rights in one of Colorado's 70 water districts. The proceeding relating to Water District 37 is not one

¹¹This footnote omitted here.

¹²This footnote omitted here.

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"for the adjudication of rights to the use of water of a river system or other source" within the meaning of Section 666. The courts have in general required that all parties claiming rights to the use of water of a river system or other source be before the court, and that the suit be one for an *inter sese* determination of all claimed rights. In *Dugan v. Rank*, 372 U.S. 609, 618, this Court spoke of "a *general* adjudication of 'all of the rights of various owners on a given stream.'" And in *Miller v. Jennings*, 243 F.2d 157, 159 (C.A. 5), the court said:

The United States has not given its consent to be joined as a defendant in every suit involving water rights. It may be made a party only in suits "for the adjudication of rights to the use of water of a river system or other source." There can be an adjudication of rights with respect to the upper Rio Grande only in a proceeding where all persons who have rights are before the tribunal. * * *¹³

Assuming here that the proceeding in Water District 37 is for an *inter sese* adjudication of all water rights claimed in Water District 37, and that the district court can bring all necessary parties before it, the question remains whether Water District 37 includes a "river system" within the meaning of the statute. We believe it does not. Water District 37 is only one of 70 water districts in Colorado (see note 15, *infra*). And the United States has been joined in similar proceedings in Water Districts 36, 51, and 52 in Colorado,¹⁴ as well as in other States, including Utah, Idaho, New Mexico and Washington. More such suits can be expected to follow if the Colorado Supreme Court's decision is al-

¹³This footnote omitted here.

¹⁴This footnote omitted here.

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lowed to stand. Certainly Congress did not intend the United States to be burdened with the defense of innumerable suits to adjudicate rights as to only small portions of recognizable river systems. Since the United States has water rights throughout entire river systems, such as the Colorado River, it is more likely to be adversely affected by piecemeal adjudications than private parties whose interests are not so widespread. Congress obviously had this in mind when it enacted 43 U.S.C. 666, and that provisions should be construed accordingly.¹⁵

* * * * *

¹⁵This footnote omitted here.

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Office Supreme Court U.S.
FILED May 14, 1970
John F. Davis, Clerk

APPENDIX

Supreme Court of the United States

* * * * *

In the District Court in and for the County of Eagle
and State of Colorado.

* * * * *

The Colorado River Water Conservation District,
Petitioner.

NOTICE OF APPLICATION FOR SUPPLEMENTAL
ADJUDICATION OF WATER RIGHTS

* * * * *

All persons, associations and corporations interested
in the priority of rights to the use of water for bene-
ficial purposes in Water District No. 37.

YOU ARE HEREBY NOTIFIED That the above
named Petitioner has filed a petition, * * *

* * * * *

* * * this notice shall not require any owner or
claimant of a water right which has already been ad-
judicated to submit such water right in this supple-
mental adjudication.

YOU ARE FURTHER NOTIFIED that in said
petition, filed as aforesaid, the petitioner asked for an
adjudication of the following amounts of water as set
opposite each of its claims herein, to-wit:

- (a) The Wolcott Reservoir—65,975 acre feet of
water, including 810 acre feet of dead storage;
- (b) Wolcott Pumping Pipeline—500 cubic feet of
water per second of time;

all dating back to April 27, 1966 for municipal, indus-
trial, domestic, irrigation, stock watering, electric power

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generation, recreational and other beneficial uses and purposes.

(c) Nolan Creek Feeder Canal—38.5 cubic feet of water per second of time.

(d) Hat Creek Feeder Canal—27.0 cubic feet of water per second of time.

all dating back to June 10, 1966 for irrigation, domestic, municipal, industrial and other beneficial uses and purposes;

* * * * *

WITNESS my hand and the seal of said Court this 3rd day of October, 1967.

* * * * *

In the Matter of the Adjudication of Priority Rights to the Use of Water for Irrigation and Other Beneficial Purposes in Water District No. 37 in the State of Colorado, The Colorado River Water Conservation District, Petitioner.

**MOTION TO DISMISS THE UNITED STATES
FOR LACK OF JURISDICTION**

The United States moves this Court to dismiss the United States from the above-captioned action for lack of jurisdiction for the reasons set forth in the accompanying Memorandum of Points and Authorities.

* * * * *

**MEMORANDUM OF POINTS & AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS THE
UNITED STATES FOR LACK OF JURIS-
DICTION**

* * * * *

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V FORMER ADJUDICATIONS & RIGHTS OF THE UNITED STATES IN WATER DISTRICT NO. 37

The United States claims water rights in Water District 37 which have never been the subject of an adjudication proceeding. These rights are under the administration of the Department of Agriculture. These rights claimed by the United States are rights with a date of reservation earlier than priorities granted in previous adjudications in Water District No. 37. To be specific:

The United States will claim those rights to use the waters within Colorado Water District 37 (primarily the Eagle River and its tributaries) by reason of the withdrawal of public lands within Water District 37 and the reservation thereof as National Forest lands. Said withdrawal was made by Presidential Proclamation of August 25, 1905 (34 Stat. 3144), and the United States claims those waters that it may now or in the future require for the purpose of said withdrawal with a priority of August 25, 1905.

In addition to our general reserved right, the United States will claim various specific uses, as follows:

(a) 39 specific uses upon the above said withdrawn lands for which the United States has made filings with the State Engineer. The dates of these filings run from 5/18/1939 to 3/1/1965. The United States will, however, claim the date of reservation, 8/25/1905.

(b) 185 specific uses upon the above said withdrawn lands for which the United States has made no filing with the State Engineer. Of the uses, 68 are current uses and 117 are foreseeable uses. The United States will claim the date of reservation, 8/25/1905.

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(c) 10 C.F.S. for the McInturn Ranger Station Ditch, diverted from the Eagle River at a point on the right bank of the river whence the northwest corner of the SW $\frac{1}{4}$ of Sec. 36, T. 5 S., R. 81 W., 6th P.M. bears S. 87° 25' W, a distance of 1982 feet. The date of appropriation is September 16, 1941. The water is used for irrigation, watering, and fire protection.

(d) 1 C.F.S. for Nelson Ditch diverted from the Eagle River at a point on the south bank of the river, whence the northwest corner of the SW $\frac{1}{4}$ of Sec. 36, T. 5 S., R. 81 W., 6th P.M. bears S. 75° 31' W, a distance of 1337.1 feet. The date of appropriation is May 28, 1902. The water is used for irrigation and stock watering.

(e) Additional specific uses may be claimed. For example, at the moment the Department of Agriculture is investigating the general reserved right and six specific uses on an area acquired from the Department of Defense and known as Camp Hale. The reservation and priority dates have not been determined at this time.

* * *

SUPPLEMENT TO MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF MOTION
TO DISMISS THE UNITED STATES FOR
LACK OF JURISDICTION

indicate briefly the nature and date of certain additional rights claimed by the United States, but which were only reported to the Department of Justice in the past two weeks.

* * *

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(3) The United States claims 19 rights to use springs and waterholes on lands managed by the Bureau of Land Management. In regard to these springs the United States claims a reservation date of April 17, 1926, based on an Executive Order issued that date entitled Public Water Reserve No. 107. In addition to the April 17, 1926, reservation date, the United States claims it has priority to use these springs under § 148-2-2, Colo. Rev. Stat. (1963). In the alternative, the United States will claim priorities at least as early as the early 1940's for most of the springs.

(4) The United States claims rights for approximately 75 additional uses on lands managed by the Bureau of Land Management for livestock, wildlife and recreation. These uses fall into two principal categories: (a) small reservoirs or retention dams; and (b) small diversions from both perennial and intermittent streams. The United States claims priorities in the 1940's, 1950's and 1960's for the reservoirs and retention dams. Information concerning the priorities for the diversions has not yet been supplied to the Department of Justice. In addition, the United States may claim a reservation date for some of these rights.

* * * * *

No.....

In the Supreme Court of the State of Colorado

The United States of America v. The District Court
in and for the County of Eagle and State of Colorado
and the Judge Thereof, the Honorable William H. Luby.

APPLICATION FOR WRIT IN THE
NATURE OF PROHIBITION

COMES NOW the United States of America * * *
and PRAYS that an alternative Writ in the Nature
of Prohibition issue out of this Court to the District
Court in and for the County of Eagle and State of
Colorado and to the Judge thereof, the Honorable Wil-
liam H. Luby, prohibiting said court and Judge from
asserting jurisdiction over the United States, from ad-
judicating any water rights of the United States or from
purporting to bind the United States in Civil Action
No. 1529, captioned IN THE MATTER OF THE
ADJUDICATION OF PRIORITY RIGHTS TO THE
USE OF WATER FOR BENEFICIAL PURPOSES
IN WATER DISTRICT NO. 37 IN THE STATE OF
COLORADO (a supplemental adjudication in Water
District No. 37 under section 148-9-7, Colo. Rev. Stat.
(1963)), for the reason that said court and Judge
are wholly without jurisdiction over the United States.
The grounds for this application and the circumstances
out of which it arose are as follows:

(1) On November 2, 1967, the Attorney General
of the United States received by registered mail a copy
of NOTICE OF APPLICATION FOR SUPPLE-
MENTAL ADJUDICATION OF WATER RIGHTS
for Civil No. 1529, * * *

* * * * *

(11) At said hearing on August 20, said Judge ruled
from the bench that the motion of the United States
to dismiss be denied and the motion of Denver for
supplemental notice be denied. Said Judge has set Oc-
tober 21, 1968, as the last date for filing statements of
claim and October 28 as the date for taking evidence
in said matter.

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(12) The question of jurisdiction of the United States in 1529 is one of great importance. The United States is the owner of many water rights in the State of Colorado. By and large these rights have not been adjudicated under Colorado adjudication procedures (148-9-1 et seq., C.R.S. (1963)). The United States, however, has recently been served in three additional supplemental adjudications:

- (1) W.D. 36, Dist. Ct., Summit Co., Civil No. 2371;
- (2) W.D. 51, Dist. Ct., Grand Co., Civil No. 1768; and
- (3) W.D. 52, Dist. Ct., Eagle Co., Civil No. 1548.

The United States has filed motions to be dismissed from each of these adjudications, which motions are still pending. In addition, the United States has been informally advised by members of the Bar of Colorado that it may expect to be served in many more supplemental adjudications throughout Colorado. Thus it is clear that many citizens of the State of Colorado are attempting to bind the United States to proceedings to which it was not a party and to cut off and destroy the rights of the United States by the means of having the courts of Colorado assert purported jurisdiction over the United States in supplemental adjudications. This creates the need for a clear opinion from this tribunal upholding the immunity of the United States from suit.

It should be pointed out, of course, that if this Court were to find that this Application and its supporting brief misstate Colorado law and were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date

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of its reserved and appropriative rights, most of the objections of the United States to these adjudications would be removed. While the United States could not, even then, be joined as a defendant under 43 U.S.C. sec. 666, for the reason that an entire river system would not be involved, the United States would be assured it could have its rights properly adjudicated if it chose to appear as plaintiff in a Colorado Water District adjudication. While no representation can be made at this time as to what the United States would do in any particular case, it can be represented that the Department of Justice would raise no general objection to appearances as plaintiff in appropriate cases under the supposed circumstances.

WHEREFORE, the Petitioner, the United States of America prays this Honorable Court:

1. To take original jurisdiction in the matters thus presented to it;
2. To issue an order commanding the respondent court and Judge to show cause why they, and each of them, should not be prohibited from asserting or attempting to assert jurisdiction over the United States in Civil No. 1529;
3. To issue an order prohibiting the respondents, said court and Judge, from asserting or attempting to assert jurisdiction over the United States in Civil No. 1529.

* * * * *

October 14, 1968

* * * * *

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No. 23819

The United States of America, Petitioner v. the District Court in and for the County of Eagle and State of Colorado and the Judge Thereof, the Honorable Harold A. Grant, Respondents. The Colorado River Water Conservation District, City and County of Denver, Acting by and Through the Board of Water Commissioners, Central Colorado Water Conservancy District, and the New Jersey Zinc Company, Intervenor.

ORIGINAL PROCEEDING

EN BANC

RULE DISCHARGED

[Colo.; 458 P.2d 760]

* * * * *

MR. JUSTICE GROVES delivered the opinion of the Court

This is an original proceeding in this court wherein the United States has asked for a writ prohibiting the district court from asserting jurisdiction over it in a supplemental water adjudication under C.R.S. 1963, 148-9-7. We issued a rule to show cause why the relief requested should not be granted.

The proceeding is in Water District 37 of the State of Colorado, which embraces the Eagle River and its tributaries. The Eagle River is a tributary of the Colorado River and is non-navigable. There have been a number of previous adjudications in this water district. The decree in the original adjudication was entered eighty years ago and the last one was entered on February 21, 1966. The United States was not a party in any of these earlier proceedings.

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The current proceedings were commenced by the Colorado River Water Conservancy District and it sought to make the United States a party under 43 U.S.C. §666 (known as the McCarran Amendment) [see *supra* this APPENDIX Pages 1 and 2] [458 P.2d 761-762]

* * * * *

The United States moved the district court for dismissal as to it by reason of lack of jurisdiction. This motion was denied by the Honorable William H. Luby, the judge of the court, who has since retired. We have concluded that the district court has jurisdiction over the United States in these proceedings and that the motion was properly denied.

The propositions asserted by the United States are based upon the solid foundation that: (1) the United States cannot be subjected to the jurisdiction of any court without the consent of Congress; and (2) the only statute adopted by the Congress consenting that the United States may be made a party to a water adjudication is the McCarran Amendment. * * * The Government's propositions are as follows:

(1) The McCarran Amendment can be used only with respect to a general adjudication of a river system in which all rights of all users are before the court; and the present proceeding does not involve (a) a general adjudication, (b) an entire river system, nor (c) all water users in the district.

(2) The United States has unadjudicated rights antedating the last adjudicative decree and the district court cannot give priorities to these rights prior to the date of the last adjudication.

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(3) The district court has jurisdiction only to adjudicate rights arising out of Colorado law and the United States claims rights arising otherwise.
[458 P.2d 762]

* * * * *

IV

APPROACH TO THE ADJUDICATION OF WATER
RIGHTS OF THE UNITED STATES

[458 P.2d 767]

The remainder of the propositions asserted by the Government (as outlined early in this opinion) might be characterized as follows:

If the state court in Colorado has jurisdiction over the United States, how and why can it grant the relief the United States would desire with respect to its water rights? In oral argument counsel for the Government indicated if there were a satisfactory answer to that question, the United States might not be so loathe to submit itself to the jurisdiction of our state courts. He also gave the distinct impression that he would be most surprised if we produced a ruling which would overcome the trepidation of the Justice Department to see federal water rights under the state jurisdiction. Whether or not we mitigate the sovereign reluctance, we hold that under its plenary power a Colorado district court can make the relative rights of the United States a subject of its decree and can bring under its jurisdiction additional necessary parties in order to make such a decree fully valid, effective and enforceable. Before elaborating on this declaration, we deem it advisable to discuss some of the features and problems involved—or perhaps to be involved—in any dec-

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retory approach to the water rights of the United States in Colorado, which must be confronted someday whether in our state courts or in a federal forum.

In the district court the United States filed a memorandum supporting its motion to dismiss. It there made the following statement concerning its claims to the use of water:

[See *supra* this APPENDIX Pages 8 and 9]

* * * * *

V

RESERVED RIGHTS

[458 P.2d 768]

The Government insists that our district courts have jurisdiction only to adjudicate rights under the doctrine of appropriation and, therefore, they do not have jurisdiction over the so-called reserved water of the United States. It advises us that such reserved rights are valid with priorities substantially antedating several of the supplementary decrees in Water District 37 under the authority of *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed. 2d 542; *Federal Power Commission v. Oregon*, 349 U.S. 435, 75 S.Ct. 832, 99 L.Ed. 1215; *Winters v. United States*, 207 U.S. 546, 28 S.Ct. 207, 52 L.Ed. 340; *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136.

In contrast, counsel or the intervenor Central Colorado Water Conservancy District contend that the United States has no rights whatsoever except any that it might have acquired in the same manner as an individual. In support of this they cite Article XVI, §§ 5 and 6 of the Colorado constitution and *Stockman v.*

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Leddy, 55 Colo. 24, 129 P. 220. These sections were placed in the constitution at the time it was prepared under the enabling act of Congress. Section 5 and a portion of Section 6 read as follows:

“Section 5. Water of streams public property.—The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

“Section 6. Diverting unappropriated water—priority preferred uses.—The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. * * *”

* * * * *

Winters v. United States, *supra*, [458 P.2d 770] involved water for an Indian reservation reserved prior to the admission of Montana into the Union. It was argued that the subsequent admission of Montana into the Union “upon an equal footing with the original States” (25 Stat. 676) repealed the reservation of water. This argument was not accepted. We are not concerned here with water rights asserted by the United States prior to Colorado’s admission into the Union.

The *United States v. Rio Grande Dam & Irrig. Co.*, *supra*, involved acts within the Territory of New Mexico prior to the time New Mexico became a state. It was there stated:

* * * * *

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We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn. We do say at this time that, except for *Stockman v. Leddy, supra*, we have not encountered any decision determinative as to whether the United States has reserved water rights in Colorado; and we postpone the consideration of whether *Stockman* is to be overruled, as perhaps it must be if the contentions of the United States as to its reserved water rights are found to be sound.

VI

WATER APPROPRIATIONS OF THE UNITED STATES UNDER STATE LAW

[458 P.2d 771]

* * * * *

* * * the Government * * * quotes from *Arizona v. California*, 298 U. S. 558, 56 S. Ct. 848, 80 L.Ed. 1331 that "no decree rendered in its absence can bind or affect the United States * * *."

* * * * *

It well may be that the same principle should be applied to appropriations made by the United States which have not been included in previous adjudications to which the United States was not a party.

VII

JURISDICTION OVER THE WATER CLAIMS
OF THE UNITED STATES

[458 P.2d 771]

We now return to the proposition asserted earlier that the United States can obtain in a supplementary water adjudication in Colorado an adequate judicial determination of its rights and relative priorities. For the purpose of our holding in this respect we make the following three assumptions *arguendo*: (1) the United States has reserved water rights in Water District 37 initiated prior to more recent general adjudication decrees in that district; (2) The United States has acquired rights to the use of water under Colorado law and such rights were initiated prior to the decrees just mentioned; and (3) The United States is entitled to a decree that its rights to the use of water are the same as if each of those rights had been awarded priorities in a water adjudication next following the initiation of the right. We repeat—these are assumptions *arguendo*—not determinations.

Water rights in Colorado are of the greatest importance to the welfare and economy of the people of this state, and of considerable importance to the United States. There are about 2,700,000 acres of land under irrigation in Colorado. Of the 66½ million acres of land in Colorado, the United States has 36.4%—or about 24½ million acres—in the form of public domain, national forests, national parks and monuments, military reservations and an Indian reservation.

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We have a situation in which the federal sovereign claims water rights which are nowhere formally listed, which are not the subject of any decree or permit and which, therefore, are etheric in large part to the person who has reason to know and evaluate the extent of his priorities to the use of water. To have these federal rights in a state of uncorrelated mystery is frustrating and completely contrary to orderly procedure—and this is equally true from the standpoint of the United States as well as Colorado and its citizenry. The fact that our statutes do not provide for the adjudication of the rights of the United States with priorities prior to the dates of later decrees does not mean that our district courts in a water adjudication cannot determine the rights of the United States in relation to decreed water rights. On the contrary, our district courts have that jurisdiction. "The district courts shall be trial courts of record with general jurisdiction, and shall have original jurisdiction in all civil, probate and criminal cases, except as otherwise provided herein * * *." Colo. Const. art. VI, § 9(1). We hold that the Constitution, without the need of any statute, grants jurisdiction of the subject matter under consideration.

* * * * *

For the reasons already expressed as to the promotion of orderly procedure, we hold that it was the purpose and intent of the McCarran Amendment that it be used to obtain jurisdiction over the United States with respect to its reserved water rights. Of particular significance was the letter of the Acting Assistant Secre-

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tary of the Interior to the Chairman of the Committee on the Judiciary as to the McCarran Amendment under date of August 3, 1951. This is made a part of the Committee's Report mentioned earlier on pages 7 and 8. Senate Calendar No. 711, *supra*. A portion of the letter reads:

"The interests of the United States in the use of the waters of its river systems are so many and so varied that a full enumeration of them could not be made without a great deal of careful study. It is enough, I hope, for present purposes to exemplify these interests by pointing to those which it has under the commerce clauses of the Constitution; those which exist by virtue of the creation of Indian reservations under the doctrine of *United States v. Winters* (207 U.S. 564 (1908))

* * *

* * * We are holding here that whatever rights the United States has to water can be recognized and adjudicated by our district courts just as adequately as in any other forum—and perhaps more adequately. Therefore, it would seem that no adequate reason exists to withhold reserved rights from the light of day and adjudication.

* * * * *

IX

WATER RIGHT DETERMINATION AND
ADMINISTRATION ACT OF 1969

[458 P.2d 774]

Senate Bill 81 adopted in 1969 (C.R.S. 1963, 148-21-1 *et seq.*) was approved after the briefs were filed in this proceeding and prior to oral argument. Following oral argument the United States and the City and County of Denver filed supplemental briefs on the subject of the effect of this Act upon the questions involved, if any. Since the district court did not have this matter before it, we deem it the better part of wisdom to await its determination with respect to this matter. We do not make the observation that some or all of the parties in Water District 37, as well as in similar proceedings in other parts of the state which have been held in abeyance awaiting this opinion, may conclude that the provisions of the 1969 Act are more suitable than the pre-existing statutes for adjudications involving the United States.

Rule discharged.

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Office, Supreme Ct, U.S.

FILED

May 15, 1970

John F. Davis, Clerk

In the Supreme Court of the United States, October Term, 1969 [1970]. No. 1178[87].

United States, Petitioner v. The District Court in and for the County of Eagle and State of Colorado.

On Writ of Certiorari To The Supreme Court Of The State Of Colorado.

BRIEF FOR THE UNITED STATES

* * * * *

QUESTIONS PRESENTED

[See *supra* this APPENDIX, page 1]

* * * * *

STATUTE INVOLVED

[See *supra* this APPENDIX, pages 1 and 2]

* * * * *

[See *supra* this APPENDIX, pages 2 and 3]

STATEMENT

* * * * *

In the course of its opinion the court strongly suggested that the United States has no water rights in Colorado except those arising under State law. The court said the cases cited by the United States in support of its claimed reserved rights—*Arizona v. California*, 373 U.S. 546; *Winters v. United States*, 207 U.S. 564; *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690; and *Federal Power Commission v. Oregon*, 349 U.S. 435—were not determinative. It indicated that a decision that the United States has re-

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served rights in Colorado streams would require the overruling of *Stockman v. Leddy*, 55 Colo. 24. There it had said that the United States, by admitting Colorado into the Union with a provision in its constitution declaring unappropriated waters of streams within its borders to be the property of, and subject to appropriation by, the people of Colorado,² lost any right to assert thereafter water rights in Colorado except those acquired by appropriation pursuant to Colorado law (A. 34-35).

SUMMARY OF ARGUMENT

* * * * *

II

That the United States had reserved water rights based on withdrawals from the public domain is well established. *Arizona v. California*, 373 U.S. 546; *Winters v. United States*, 207 U.S. 564. The withdrawal, in 1905, of lands in Colorado for the White River National Forest reserved enough water from sources on those lands to fulfill the purposes for which they were withdrawn. The Colorado Supreme Court's suggestion that the Colorado Constitution, which has been held to assert ownership of all unappropriated waters within the State, precludes ownership by the United States of reserved rights in Colorado based on withdrawals from the public domain subsequent to statehood, is erroneous. Congress did not intend, in passing the enabling act providing for Colorado statehood, to give up any of its rights with respect to the public domain.

* * * * *

²This footnote omitted here.

ARGUMENT

Introduction. An understanding of the issues in this case requires a careful consideration of federal withdrawals of land from the public domain, with particular emphasis on the purposes of such withdrawals.

* * *

* * * about 443,000,000 acres have been withdrawn from the public domain for use as Indian reservations, military reservations, national parks, national forests, national recreation areas, national munuments, wildlife refuges, etc.³ Most of these withdrawals from the public domain have been made for the express purpose of conserving important segments of that area for the future use and enjoyment of the entire public of the United States, rather than for the particular profit or use of the people who happen to live and work in the immediate area. * * *

The water rights of the United States based on federal law consist primarily of reserved rights. Reserved rights entitle the United States to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, with a priority as of the date of withdrawal, subject only to water rights vested as of that date. *Winters v. United States*, 207 U.S. 564, 577; *Arizona v. California*, 373 U.S. 546, 598, 601. Not only is this a settled principle of law, but indeed a necessary one. For it would be idle to set aside large areas of the public domain for the enjoyment of future generations without providing the assurance of sufficient water for their maintenance.

* * * * *

³This footnote omitted here.

I.

43 U.S.C. 666 Does Not Consent to Adjudications of
the Reserved Water Rights of the United States

The Colorado Supreme Court has held that the United States, through the enactment by Congress in 1952 of 43 U.S.C. 666, has consented to the adjudication of its reserved water rights in State courts (A. 41). That holding is, we submit, erroneous. As indicated previously (*supra*, p. 6), the United States unquestionably has the right to use as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn, subject only to water rights vested as of the date of the withdrawal. *Arizona v. California*, 373 U.S. 546, 595-601; *Winters v. United States*, 207 U.S. 564; *United States v. Ahtanum Irrigation District*, 236 F.2d 321 (C.A. 9), certiorari denied, 352 U.S. 988; *United States v. Walker River Irrigation District*, 104 F.2d 334, 336-337, 339-340 (C.A. 9). In *Winters*, where the United States asserted this right with respect to an Indian reservation, this Court said (207 U.S. at 577):

[T]he power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *The United States v. The Rio Grande Ditch & Irrigation Co.*, 174 U.S. 690, 702; *United States v. Winans*, 198 U.S. 371. * * *

This essential idea has been brought up to date and correlated with the realities of modern public land management in *Arizona v. California*, 373 U.S. 546, 598, 601, where this Court stated:

We have no doubt about the power of the United States under these clauses [the Commerce Clause,

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Art. I, Sec. 8, and the Property Clause, Art. IV, Sec. 3, of the Constitution] to reserve water rights for its reservations and its property.

* * * * *

The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

* * * * *

II.

The Reserved Rights Doctrine Is Applicable to Lands Withdrawn From the Public Domain in the State of Colorado

While the Colorado Supreme Court has not specifically denied the existence of federal reserved water rights in Colorado or elsewhere in the West, its statements casting doubt on their existence underline our concern that State courts and State law together would, in fact, eliminate such rights. For this reason, we urge this Court specifically to reaffirm the principle that the United States has reserved water rights in the western States, including Colorado and other States with similar constitutional provisions. [See APPENDIX, Pages 14-15]

* * * * *

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The fact that Colorado was admitted into the Union prior to the date of the withdrawal here involved, with a provision in its constitution which the Colorado Supreme Court, in *Stockman v. Leddy*, 55 Colo. 24, construed as an assertion of ownership of all unappropriated waters within its borders, does not preclude ownership by the United States of reserved water rights in Colorado. *Arizona v. California*, 373 U.S. 546, 597-598. By passing the enabling act providing for Colorado statehood,¹² Congress intended only to authorize statehood, not to give up any of its property rights with respect to the public domain. This is made clear by Section 4 of the enabling statute, which provides:

[T]he people inhabiting said Territory do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within said Territory, and that the same shall be and remain at the sole and entire disposition of the United States * * *.

* * * * *

The supplemental adjudication proceeding in Water District 37 does not meet the foregoing requirements of a general adjudication, and the court below accordingly erred in holding that the United States was properly joined. The United States does not contend that the cases construing 43 U.S.C. 666 are necessarily dispositive of the question whether Water District 37, which embraces the watershed of one tributary of the Colorado River, comprises a "river system" within the mean-

¹²This footnote omitted here.

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ing of the statute. But it seems apparent from the legislative history that Congress did not intend the United States to be burdened with the defense of innumerable suits to adjudicate only fragments of recognizable river systems. Since the United States has water rights throughout entire river systems, such as the Colorado River, it is more likely to be adversely affected by piecemeal adjudications than private parties whose interests are not so widespread. Where a river system can be said to be wholly contained within one State, the proceeding should at least relate to the entire system and include all parties asserting rights to the water thereof. And where a river system traverses the boundaries of a single State, the United States should not, we submit, be required to assert its rights in any proceeding that is less than statewide in character.

* * * * *

May, 1970

Supreme Court, U.S.

FILED

JUL 15 1970

E. Robert Seaver, Clerk

In the Supreme Court of the United States, October Term, 1970, No. 87.

United States, *Petitioner* v. The District Court in and for the County of Eagle and State of Colorado *** *Respondents*. The Colorado River Water Conservation District, City and County of Denver * * * Central Colorado Water Conservancy District, and the New Jersey Zinc Company, *Intervenors*.

On Writ of Certiorari to the Supreme Court of the State of Colorado.

BRIEF FOR RESPONDENTS
AND INTERVENORS

* * * * *

STATEMENT

In October 1967, upon the petition of the Colorado River Water Conservation District,¹ the District Court for Eagle County, Colorado issued a Notice of Application for Supplemental Adjudication of Water Rights (A. 3-4) covering the Eagle River and its tributaries,² an intrastate river system³ tributary to the Colorado River. * * *

* * * * *

¹This footnote omitted here.

²This footnote omitted here.

³The Eagle River is a substantial tributary of the Colorado River in Colorado. The mainstream is about 65 miles in length, and of numerous tributaries, some 17 totalling an additional 180 miles may be considered major water producers. The system drains 950 square miles and delivers to its confluence with the Colorado River an annual average of about 408,000 acre feet of water after all present upstream depletions.

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When the respondent court denied the motion to dismiss and calendared the case, instead of actually filing the claims its memorandum referred to so that they could be known and evaluated, the Government applied to the Supreme Court of Colorado for a writ of prohibition (A. 10-15), at the same time advising that court (A. 14):

It should be pointed out, of course, that if this Court were to find that this Application and its supporting brief misstate Colorado law and were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriate rights, most of the objections of the United States to these adjudications would be removed. (emphasis added)

The Supreme Court of Colorado issued a rule to show cause to the court below (A. 16), answer was made (A. 17-18), and the Colorado Supreme Court reviewed the case on briefs and oral arguments.⁵

* * *

* * * * *

⁵The Colorado River Water Conservation District appeared on behalf of and in support of the action of the respondent court denying the motion of the United States to dismiss. Other respondents below were parties in the adjudication proceeding. The City and County of Denver is the largest single user of water in the State and a substantial part of its water supply will come from the Eagle River system. The Central Colorado Water Conservancy District is a claimant of water in that area and New Jersey Zinc Company is also an owner, user and claimant of water in the area. All are affected by the rights the United States indicates it would claim.

SUMMARY OF ARGUMENT

* * * * *

II

The issue on which the Government sought certiorari in this Court was whether the respondent court had jurisdiction to entertain the Government's claims. The respondent court supported that effort in order to put the jurisdictional issue to rest and this Court accepted the case on that basis. Now the Government in effect seeks a declaratory order "reaffirm[ing] the principle that the United States has reserved water rights" while at the same time asking this Court to dismiss it from any adjudication. The reason to reaffirm reserved rights, we are told, is that the court below made statements "casting doubt on their existence [thus underlining] our concern that State courts and State law together would . . . eliminate such rights." *If* the court below does in fact do that, then is the time for informed review of the question. But the court below has not done so and thus the question is not here. Even if it were, the many unresolved questions concerning reservations and whatever water rights may attach thereto make it clear that this Court should await a factual determination below before proceeding further, assuming any further action at that time is necessary. This Court has not heretofore made a blanket reaffirmance of the reservation principle and should not now. It has only been enunciated in the past when the facts before the Court justified its implication.

III.

As noted, in seeking prohibition the United States told the Supreme Court of Colorado that if it:

were to hold that the United States could adjudicate all of its rights in proceedings such as this

Appendix Page 38

and obtain the true priority date of its reserved and appropriative rights, most of the objections of the United States to these adjudications would be removed." (A. 14)

* * * * *

II.

Upon The Resolution Of The Question Of Jurisdiction, Which Is All That Was Decided In Both Courts Below, Many Unresolved Issues Remain For Trial And Determination Before Claims Under The Reservation Doctrine Will Be Ripe For Review In An Appellate Court Or Before It May Properly Be Asserted That State Proceedings "Eliminate" (Brief 20) Such Rights.

The Government's request that this Court "reaffirm the principle [of] reserved water rights" (Brief 20) prior to a presentation of specific claims is premature, unnecessary to a decision of this cause, and presents a question not before the Court on certiorari.

* * * The Supreme Court of Colorado did in fact state (A. 37):

We are not determining whether the United States has reserved water rights in connection with lands withdrawn subsequent to August 1, 1876, the date of Colorado's admission to the Union; nor, if so, whether these rights have priority over previously adjudicated rights. These questions properly should be decided after the United States presents its specific claims for adjudication and the issues of fact and law are clearly drawn.

* * * * *

The Government plainly misconstrues the court below in charging that the cases cited by the United

States in support of its claimed reserved rights—*Arizona v. California*, 373 U.S. 546; *Winters v. United States*, 207 U.S. 564; *United States v. Rio Grande Irrigation Co.*, 174 U.S. 690; and *Federal Power Commission v. Oregon*, 349 U.S. 435—were held as not “determinative” as a consequence of the Colorado Constitution and *Stockman v. Leddy*, 55 Colo. 24 (Brief 4-5). * * *

The United States should go back to that court for a determination of all of its claims before it comes here expressing concern that “State courts and State law together would, in fact, eliminate such rights” (Brief 20). At least one reason for the need for such a determination is that most and possibly all reserved rights claimed to exist must be implied if they are to be found at all, and then quantified to bring certainty in water use. This Court found in *Arizona v. California*, 373 U.S. 546, that the reserved rights claimed for Indian Reservations had to be implied (at 599), as had been the case in *Winters v. United States*. The Special Master in *Arizona v. California* had found “. . . the intent to reserve water was never explicitly stated at the time the Indian Reservation was established; rather that intent was implied from the circumstances surrounding the creation of the Reservation”.⁵⁰ He thus took a great amount of evidence concerning these Reservations, including their population, economy, acreage and water requirements and then quantified the water rights for five Reservations on the mainstream of the Colorado River, rejecting the possibility of an open-end decree,⁵¹ in order to “establish water rights to fixed magnitude and priority so as to provide certainty for both the

⁵⁰This footnote omitted here.

⁵¹This footnote omitted here.

United States and non-Indian users." This Court specifically approved the Master's findings that a reservation of water had been intended for each of the five Indian Reservations involved, agreed with his conclusion as to the quantity of water intended to be reserved, and found the various irrigable acreages included by the Master in reaching quantities of water to be reasonable.⁵² This specificity in treating with conflicting claims in this vital area of water rights is in our view the great contribution of the adjudicatory process, and was what Congress intended in consenting to the joinder of the United States in State proceedings for the consideration of all claims.⁵³

The necessity for doing away with the uncertainty engendered by the implied reservation doctrine is strongly urged in the recent Public Land Law Review Commission Report.⁵⁴ That Report also details problems arising out of the reservation concept, most if not all of which require some evidentiary proceeding before a de-

⁵²This footnote omitted here.

⁵³This Court in *Arizona v. California* approved the fact that the Master declined to adjudicate claims by the United States for other Indian Reservations and federal establishments, particularly those relating to tributaries (*Id.* 595). The Master found it inappropriate to adjudicate matters of intrastate rights and priorities on the tributaries (Master's Report 332-334) and this Court noted that under § 18 of the Project Act "regulation of the use of tributary water" was left to the states (*Id.* 588). The Master did adjudicate conflicting claims of the States and of the Government on the Gila River because this was an interstate tributary on which the controversy was immediate and requiring of decision. But even here he declined to approve a claim on behalf of an Indian Reservation located in Arizona against (1) users of water in New Mexico because the evidence showed it to be impractical, as well as against (2) users of water in Arizona because this was a matter of "intrastate rights and priorities". (Report 333-334). These few references show the desirability of an adjudication and a record before reaching conclusions as to the extent of any claims to the use of water.

⁵⁴This footnote omitted here.

termination could be made.⁵⁵ These unresolved issues in connection with reservations provide additional reasons why we urge this Court to decline the Government's invitation to generalize now on the reservation principle.

To dispose of the uncertainty and other problems in the reservation doctrine the Commission suggests legislation to:

1. Provide a reasonable time for Federal agencies to give public notice of water needs for reserved areas and forbid assertion of reserved claims not so published.
2. Establish procedures for administrative or judicial determination of the reasonableness of the quantity claimed, or validity of the proposed use under present law.
3. Provide that express reservations of water be made in connection with any future reservations of land, and
4. Require that compensation be paid where application of the implied reservation doctrine interferes with uses vested prior to the *Arizona v. California* decision in 1963.

* * * * *

III.

* * * * *

Nevertheless the Government says that "even if an entire river system is in fact involved"⁵² we do not have a general adjudication because the necessary parties were not before the court at the time of the attempted joinder. The Colorado Supreme Court found no

⁵⁵This footnote omitted here.

⁵²This footnote omitted here.

difficulty in holding this to be a general adjudication within the meaning of *Dugan v. Rank*, 372 U.S. 609, 618, because proceedings such as involved in this case met the tests therein prescribed, *i.e.*, this is a public, not a private suit; all claimants are parties; relief is granted as between claimants; and priorities are established. Under Colorado law the adjudication proceedings are "general" whether an original action within a water district or one supplementary thereto. Such actions are in the nature of *in rem* proceedings, and, in the instant case, all statutory notice requirements were complied with.⁶³ Upon such compliance the court acquired jurisdiction of all persons using or claiming the right to use waters of the Eagle River and its tributaries.

The Government now urges that since it would, if otherwise properly a party, claim rights antedating in priority the rights of others already in decree, the owners of those rights are necessary parties before the United States can properly be joined. The Government asserts this despite the fact it has not actually filed such claims, without which the need for and the identity of such parties cannot be determined. Furthermore, this assertion is made despite the fact the court below said appropriate notice could be given upon the filing of such claims.⁶⁴ Additional parties are necessitated, if at all, not by joinder of the United States but by the claim or claims it makes.

* * * * *

July 15, 1970

⁶³This footnote omitted here.

⁶⁴This footnote omitted here.

Supreme Court, U.S.

FILED

Jul 16 1970

E. Robert Seaver, Clerk

In the Supreme Court of the United States, October Term, 1969 [1970] No. 87.

United States, Petitioner v. The District Court in and for the County of Eagle and State of Colorado.

On Writ Of Certiorari To The Supreme Court Of The State of Colorado.

AMICUS CURIAE BRIEF FOR THE STATES OF COLORADO, OREGON, NEVADA, IDAHO, MONTANA AND ALASKA IN SUPPORT OF THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO

* * * * *

STATEMENT OF INTEREST

* * * * *

Various federal agencies have claimed that the reservation of land for various purposes also reserved sufficient water necessary to effectuate the purpose of the Reservation. The acceptance of such a theory of claims by the federal agencies would, on a fully utilized stream, create a situation wherein increased federal uses would deny water to users who had water rights with priorities established after the Reservation, but prior to the expanded use.

* * * * *

The States do not wish to deprive the Federal Government of valuable water rights. They know only too well that related land resources are much less valuable without the water necessary for their development. The

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States ask only an identification of the extent of the federal rights, so that existing uses might be protected and future developers, whether Federal, state or private, might better be able to predict the water supply available for further development.

QUESTION PRESENTED

Whether the United States, by reliance upon the anachronistic defense of sovereign immunity, should be allowed to avoid the identification of its claims to the use of water from reserved lands needed for the protection of existing rights and the establishment of the stability necessary for meaningful future planning of water resource development.

* * * * *

[Page 21 of brief]

The interests of the United States in the use of the waters of its river systems are so many and so varied that a full enumeration of them could not be made without a great deal of careful study. It is enough, I hope, for present purposes to exemplify these interests by pointing to those which it has under the commerce clauses of the Constitution; those which exist by virtue of the creation of Indian reservations under the doctrine of the *United States v. Winters* (207 U.S. 546 (1908)) or by virtue of the creation of, for instance, a national park; those which it has asserted by entering into international treaties; those which it may have by virtue of its present and prior ownership of the public domain and which have not vested under [a series of specified acts]; those with respect to which its officers and employees have followed the procedure prescribed in Section

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8 of the Act of June 17, 1902 (32 Statutes 388, 43 U.S.C. 383); and those which it has acquired by purchase, gift, or condemnation by private owners. Since the United States can be said, with varying degrees of accuracy, to be the "owner" of rights of any or all of these types, it is clear to me that enactment of the bill could lead to a tremendous volume of unwarranted litigation and, in the absence of a complete and detailed catalogue of all the rights and interests which the United States has in the stream systems of the nation, to the hazard that, by overlooking some, it would be forever precluded from asserting them thereafter.

* * * * *

CONCLUSION

For the foregoing reasons, the decision of the Colorado Supreme Court should be affirmed. [Though the decision is not cited in the Amicus Curiae brief, see 458 P.2d 760]

[Submitted by Attorneys General, State of Colorado, State of Oregon, State of Nevada, State of Idaho, State of Montana, State of Alaska]

Supreme Court. U.S.

FILED

JUL 15 1970

E. Robert Seaver, Clerk

In the Supreme Court of the United States, October Term, 1969 [1970] No. 87.

United States, Petitioner v. The District Court in and for the County of Eagle and State of Colorado, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Colorado.

BRIEF FOR THE STATE OF ARIZONA AND
THE ARIZONA INTERSTATE STREAM
COMMISSION AS AMICI CURIAE

* * * * *

ARGUMENT

I.

The basic dilemma which the McCarran Amendment² was intended to resolve is well-known. In the usual case the water rights of any individual claimant cannot be determined in isolation from the rights of other claimants along the same stream or other water source. A judicial determination that any one individual is entitled to a water right in a given source is of small significance, even to the claimant, unless there has also been a determination concerning the validity of other claims to the same source, including relative priorities, and quantities to which each claimant is entitled. As the Ninth Circuit Court of Appeals has observed:

"The only proper method of adjudicating the rights on a stream, whether riparian or appropria-

²This footnote omitted here.

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tive or mixed, is to have all owners of land on the watershed and all appropriators who use water from the stream involved in another watershed in court at the same time." *People of the State of California v. United States*, 235 F.2d 647, 663 (9th Cir. 1956).

* * * * *

The Ninth Circuit Court of Appeals stated the purpose of the McCarran Amendment as follows:

"There can be little doubt as to the kind of suit Congress had in mind. It was not a private dispute between certain water users as to their conflicting rights to the use of waters on the stream system; rather, it was the quasi-public proceeding in which the law of western waters is known as a 'general adjudication' of the stream system: one in which the rights of all claimants on the stream system, as between themselves, are ascertained and officially stated." *State v. Rank*, 293 F.2d 340, 347 (9th Cir. 1961).

* * * * *

* * * The significance of the statutory reference to both "river system" and also "other source" is illustrated by a situation in Arizona which is typical of the situation in other western states. The Verde River and Tonto Creek are both tributaries of the Salt River, which in turn, is a tributary of the Gila River, which, in turn, is a tributary of the Colorado River in its lower reaches. The headwaters of Tonto Creek are some 80 miles from the headwaters of the Verde River and these two are separated at all points by two large mountain ranges. The confluence of Tonto Creek and the Salt River is some 50 miles East of the confluence of the Salt and Verde Rivers. Physically it would be impossible for a user on the Verde River to interfere with a user on Tonto Creek. Of course, if an adjudication in-

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volved the rights to the use of water from the Salt River below the confluence of the Verde, then the adjudication would be broadened; perhaps such an adjudication is what was anticipated by the words "river system." However, the rights of the appropriators or users on the Verde River obviously could be adjudicated without joining the users on the Tonto.⁵ * * *

* * * A person who owns land along the Verde River and uses water of the Verde River is simply not affected by the claims of other persons along the Tonto, the Gila, or other tributaries or subtributaries of the Colorado, unless by coincidence the same person also happens to own other land on which he uses the waters of those rivers.

* * * As the Ninth Circuit Court of Appeals stated in *State of Nevada v. United States*, 279 F.2d 699, 701 (9th Cir. 1960):

"The suit to which the section [666] refers is one to establish the relative rights of users of the waters of a stream or other common source: one to settle disputes between such water users with respect to their rights among themselves."

* * * * *

Whatever the scope of sovereign immunity generally, in water rights litigation involving an entire river system or other source, sovereign immunity has been waived by the Congress of the United States. What Congress has done should not now be undone by this Court.

* * * * *

Attorney General of the State
of Arizona

* * * * *

Special Counsel, Arizona
Interstate Stream Commission

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Supreme Court, U.S.

FILED

JUL 13 1970

E. Robert Seaver, Clerk

In the Supreme Court of the United States, October Term, 1969 [1970] No. 87.

United States, Petitioner v. The District Court in and for the County of Eagle and State of Colorado.

On Writ of Certiorari to the Supreme Court of the State of Colorado.

AMICUS CURIAE BRIEF FOR THE STATE
OF UTAH

* * * * *

[For consequences of attempted piecemeal adjudication by the Justice Department and the attendant abridgment and loss of invaluable rights to the use of water by the United States of America, see *In re Green River Adjudication v. United States of America*, Appellant, 17 Utah 2d 50, 440 P.2d 251, particularly 252]

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Office, Supreme Court, U.S.

FILED

JUN 13 1970

John F. Davis, Clerk

In the Supreme Court of the United States, October Term, 1969 [1970] No. 1178 [87].

United States, Petitioner, vs. The District Court in and for the County of Eagle and State of Colorado, Respondent.

Brief of the State of California as Amicus Curiae
in Support of the District Court in and for the
County of Eagle and State of Colorado

* * * * *

Summary of Argument

* * * * *

Amicus contends that the McCarran Amendment waives immunity in an adjudication of water rights' claims *inter sese* within any determinable unit, whether that unit be the whole or a portion of a river system. Amicus further asserts that since an adjudication exclusive of "reserved rights" would render such litigation and the McCarran Amendment utterly valueless, reserved rights are clearly within the scope of rights intended to be determined under the McCarran immunity waiver.

ARGUMENT

* * * * *

* * * In *Miller v. Jennings*, 243 F.2d 157, 159, the court indicated that a general adjudication could result among those only on the Upper Rio Grande. [Contrary to express ruling—the suit was brought in Texas] In *Arizona v. California*, 373 U. S. 546, this

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court entertained essentially a general adjudication of the Lower Colorado River Basin. Thus there can be no doubt of the efficacy of adjudicating that portion of a stream requiring such a supply and demand determination without adjudicating the whole. [Contrary to express ruling: That case involved a Congressional allocation among the Lower Basin States, see 373 U.S. 546, 565 et seq.]

* * * * *

Dated: June 12, 1970.

* * * * *

Attorney General,

* * * * *

State of California.

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Office-Supreme Court, U.S.

FILED

JUN 15 1970

John F. Davis, Clerk

In the Supreme Court of the United States, October Term 1969 [1970] No. 1178 [87].

United States Petitioner versus The District Court in and for the County of Eagle and State of Colorado.

On Writ of Certiorari to the Supreme Court of the State of Colorado.

AMICUS CURIAE BRIEF FOR THE STATE
OF OKLAHOMA

* * * * *

June 15, 1970

* * * * *

INTEREST OF AMICUS CURIAE

The State of Oklahoma is essentially an appropriation state with respect to water adjudication, 87 O.S. Supp. 1969, § I-A. In determining water rights within its borders the State is faced with the problem that the United States asserts certain water rights based upon the doctrine of reserved rights. Such being the case, all determinations of water rights made concerning river systems in which the United States claims reserved rights, are subject to such reserved rights. This leads to confusion and uncertainty as concerns the water rights in such river systems. Therefore, it is believed that there should be some method through which the state can force the United States into some forum

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in order to determine the extent of the rights the United States has in such river system. The State of Oklahoma therefore has an interest in the question of whether or not 43 U.S.C. § 666 consents to suit against the United States in situations where the United States claims water rights under the doctrine of reserved rights.

* * * * *

Attorney General

* * * * *

* * * State of Oklahoma

Supreme Court, U.S.

FILED

JUL 15 1970

E. Robert Seaver, Clerk

In the Supreme Court of the United States, October Term, 1969 [1970] No. 87.

United States, Petitioner v. The District Court in and for the County of Eagle and State of Colorado, Respondent.

On Writ of Certiorari to the Supreme Court of the State of Colorado

AMICUS CURIAE BRIEF FOR THE STATE
OF WASHINGTON

* * * * *

[Contrary to the position of the Justice Department, the State of Washington very correctly views the adjudications as involving Indian rights and, indeed, sets out a verbatim opinion which, among other things, declares:]

* * * It would appear the United States may own land in the water shed and it is trustee for an Indian ward allottee having lands within the water shed
* * *.

* * * * *

[Brief dated July 1970—by * * * Attorney General
* * * State of Washington]

Supreme Court, U.S.

FILED

JUL 14 1970

E. Robert Seaver, Clerk

In the Supreme Court of the United States, October Term, 1969 [1970] No. 87.

United States, Petitioner v. The District Court in and for the County of Eagle and State of Colorado.

On Writ of Certiorari to the Supreme Court of the State of Colorado.

AMICUS CURIAE BRIEF FOR THE STATE
OF WYOMING

* * * * *

[Contrary to Justice Department position that Indian rights to the use of water are not involved, what are referred to as the principles of the Winters Doctrine are reviewed in detail in the Wyoming Amicus Curiae brief.

See citation of cases which set forth numerous references to the Winters Doctrine predicated upon Indian rights to the use of water held in trust by the United States, as proving properties owned by the Indians.]
July 1970

* * * * *

Wyoming Attorney General

* * * * *

September 25, 1970

STATEMENT IN SUPPORT OF S. 4165 "TO PROVIDE FOR THE CREATION OF THE INDIAN TRUST COUNSEL AUTHORITY, AND FOR OTHER PURPOSES"

CONFLICTS OF INTEREST WITHIN THE FEDERAL GOVERNMENT THREATEN AMERICAN INDIANS THROUGHOUT WESTERN UNITED STATES

William H. Veeder

* * * * *

Gravest crisis confronting the American Indians in Western United States in general and in the Colorado River Basin in particular is the *Eagle River Adjudication* now pending before the Supreme Court.³ Briefly the important facts and issues of the *Eagle River Adjudication* as it relates to the Indians are these:

1. Seventy percent (70%) of all of the water in the Colorado River rises in the State of Colorado. Eagle River is a principal tributary of the Colorado River within the last mentioned State.

2. The Colorado River is grossly overappropriated largely due to projects built either by Federal agencies or in conjunction with the States within the Colorado River drainage system or subdivisions of those States.

3. Gross overappropriation by the Federal Government is but one aspect of the crisis facing the American Indians in the Colorado River Basin. Pollution of that stream is an ever-increasing and immediate threat particularly to the mainstream Reservations—Fort Mojave, Chemehuevi, Colorado River Indian Reservation, Cocopah and Fort Yuma. That pollution of the stream is due to man-made depletions—reservoir evaporation losses; diversions, both in-basin and transmountain, by the

³United States * * * v. The District Court in * * * County of Eagle and State of Colorado and the Judge thereof * * *.

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Federal Government or cooperating agencies; and evapotranspiration.

4. Any relinquishment by the Federal Government of rights to the use of water in the Eagle River or other tributaries of the Colorado River, or the failure fully to assert American Indian rights in those tributaries, and correctly to represent those Indian interests, constitutes a grave threat not only to the main-stream Reservations but Reservations which rely upon the Green River, San Juan, Little Colorado and tributaries of those streams.

5. Loss of Indian rights on any of the tributaries of the Colorado River necessitates that the deficit in water supply thus created be compensated by increased burdens upon the other tributaries, the San Juan River and its tributaries, the Green River and its tributaries, for example.

6. Invaluable rights to the use of water are held by Indians and Indian Tribes throughout the Colorado River Basin, on the mainstream, the tributaries, and tributaries of tributaries, all inter-related, all inter-dependent. These include, but are not limited to, the Reservations of the Navajos, the Southern Utes, the Ute Mountain, the Uintah-Ouray, the Fort Mojaves, Chemehuevis, Hualapais, Colorado River Indian Tribes, the Cocopahs, Fort Yumas, among others.

7. These basic principles respecting the Indian *Winters Doctrine* prior and paramount rights in the Colorado River Basin must be kept in the foreground in this consideration:

(a) Indian *Winters Doctrine* rights to the use of water in the streams which arise upon,

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border or traverse the Indian Reservations are part and parcel of the land itself, having all the dignity of a freehold interest in real property;

(b) Indian rights to the use of water are private interests in real property held in trust for the Indians by the National Government for the benefit of the Indians;

(c) Indian rights, being private interests in real property and held in trust for the benefit of the Indians, are not the property of the United States available for its use as distinguished from the Indian use;

(d) In its status as trustee of the Indian rights to the use of water the National Government must, in protection and preservation of them, exercise the highest degree of care, skill and diligence, as a consequence of which it must, among other things, assert the full measure and extent of those rights throughout the Colorado River Basin.

(e) Indian rights to the use of water in the Colorado River Basin so gravely threatened by the gross overappropriation of that stream—the pollution of it—may thus be characterized:

(i) they entitle the Indians for whom they are held in trust to quantities of water sufficient to meet their present and future water requirements;

(ii) the title to rights to the use of water held in trust by the Nation for them, in whatever source or stream they exist, extends to the very well springs of the stream system which supply the water, including but not limited to the Eagle River in Colorado;

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(iii) the Indian rights to the use of water relate not only to a quantity of water to meet present and future needs, but those rights relate to the maintenance of a quality of water—not polluted water—which can reasonably be utilized by the Indians.

8. Failure by the National Government, Trustee, to assert Indian rights throughout the Colorado River Basin, in the Eagle River or other tributaries, threatens those rights not only as to quantity but likewise quality, which is inextricably interrelated to quantity.

9. *Eagle River Adjudication as conducted before the Supreme Court—a threat not only to Indian rights to the use of water in the Colorado River Basin, but could give rise to a precedent subjecting Indian rights to State courts and laws with disastrous consequences.* A prime issue presented by the Justice Department to the Highest Court for resolution in the *Eagle County Adjudication*:

Did the United States waive its sovereign immunity from suit in regard to its “reserved rights” to use of water when Congress enacted 43 U.S.C. 666?⁴

This query: Does it apply to Indian rights?

Reference at this juncture is made to the Presidential condemnation of the conflict of interest within the Justice Department respecting Indian rights to the use of water. There the President in his July 8, 1970, message, having described that “inherent conflict of interest,” said, among other things, to the Congress: “The

⁴43 U.S.C. 666, Act of July 10, 1952, 66 Stat. 560 * * *.

* * * Attorney General must at the same time advance *both* the *national* interest in the use of land and water rights *and* the *private* interests of Indians in land which the government holds as trustee."

In keeping with the Presidential condemnation, without in any way advising the Supreme Court that the *Winters Doctrine* Indian rights to the use of water are private in character—totally different from the standpoint of the law from the rights of the Nation itself—the Justice Department in its brief defined in error the "Reserved rights" as follows:

"Reserved rights have been defined by this Court as *the entitlement of the United States to use* as much water from sources on lands withdrawn from the public domain as is necessary to fulfill the purposes for which the lands were withdrawn,
* * * *Arizona v. California*, 373 U. S. 546, 595-601."⁵ (Emphasis supplied)

Under no circumstances can the American Indians tolerate the Justice Department erroneous assertion to the Supreme Court that the "Reserved rights" as defined in *Arizona v. California* is "the entitlement of the United States to use" water. Yet the Justice Department Petition for Certiorari, its brief and all supporting data, reiterate and reaffirm that error without at any time declaring that the Indian rights do not—could not—come within the erroneous definition of "Reserved rights" presented to the Court.

In the Petition for Certiorari the failure to distinguish the Indian *private* rights from the Nation's public

⁵No. 87 In the Supreme Court of the United States, October Term, 1970, *United States v. The District Court in * * * County of Eagle* * * *.

rights is well demonstrated by this excerpt from it: Having again alluded to the "federal government's reserved water rights"; "the rights of the United States to use the water on its public land"; the Justice Department describes the magnitude of its problem in the *Eagle River Adjudication* by stating: "* * * about 443,000,000 acres have been withdrawn from the public domain for use as Indian reservations, national parks, national forests * * *."⁶ This entirely incorrect endeavor to meld; to categorize the Indian rights with the Federal rights to use water, threaten a catastrophe to the Indians if 43 U.S.C. 666 is held to be applicable to the Federal rights, which as presented by the Justice Department to the Supreme Court, would necessarily embrace those Indian rights. Nevertheless throughout the brief of the Justice Department to the Highest Court, that error is repeated and compounded on numerous occasions.⁷ A striking aspect of the brief is this:

Although never distinguishing Indian rights to the use of water from Federal rights to the use of water, the Justice Department, with possibly a single exception, relies on decisions which relate entirely or predominantly to the Indian private rights held in trust for them by the National Government.

10. *Failure of Justice Department to distinguish Indian private rights held in trust by the United States, from Federal rights held for the public, threatens—*

(a) *To subject Indian rights to the waiver of immunity from suit under 43 U.S.C. 666;*

⁶Petition for Certiorari to the Supreme Court * * * of Colorado, pages 10-11.

⁷* * * Brief for the United States, pages 3-14.

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(b) To subject Indian rights to State court jurisdiction;

(c) To subject Indian rights to State law with all of the attendant irreparable damage to American Indians.

There have been reviewed in detail the Justice Department Petition for Certiorari and Brief that:

Failed to advise the Supreme Court that Indian private rights to the use of water held in trust for them, are drastically different from Federal rights held for the public at large; are governed by vastly different laws and concepts;

Failed to advise the Court that there are innumerable Treaties in which the Indians retained their invaluable immemorial rights and that those rights were never part of the public domain, nor were they carved from the public domain as the Justice Department repeatedly stated in error;

Failed to advise the Court that the decisions relied upon involved almost entirely Indian rights or were predominantly Indian rights, and did not pertain to Federal "Reserved rights" for national parks, national forests, Bureau of Land Management properties.

Consistent with its failure to distinguish the Indian rights, private in nature, held in trust by the National Government, from federally owned "Reserved rights" for public purposes, the Justice Department likewise failed to inform the Supreme Court that:

The Congressional waiver of sovereign immunity from suit in 43 U.S.C 666 did not include the Indian rights to the use of water in the Colorado River Basin or elsewhere in the United States.

Let these principles be emphasized:

Indian Tribes are osvereigns in their own right—albeit limited—and as sovereigns they are, and their properties are: (a) immune from suit in the absence of express waiver of that immunity, which 43 U.S.C. 666 most assuredly is not; (b) not subject to State court jurisdiction; (c) not subject to State law.

Yet, irrespective of those precepts of Indian law, the Justice Department in its Petition and Brief to the Supreme Court, failed to make reference to them. Hence a decision can reasonably be anticipated to the effect that the "Reserved rights" of the National Government include the Indian private rights held in trust, which is denied; that 43 U.S.C. 666 constitutes a Congressional waiver of the sovereign immunity from suit in regard to the Indian rights, which is likewise denied.

Indian prior and paramount rights are legally and conceptually different from the rights to the use of water acquired under the doctrine of prior appropriation strictly adhered to in Colorado and other like-minded States. As a consequence, to subject the Indian rights to the use of water in the Colorado River or the tributaries to that stream to State courts or laws would be tantamount to a confiscation of those rights and the Indian priorities which are property rights protected under the National and State constitutions. This disaster to the American Indians may very well ensue by reason of the facts and law as presented by the Justice Department to the Supreme Court in the Eagle River Adjudication.

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11. *A proposition has been offered by Justice to the Colorado courts which the American Indians cannot tolerate.*

In the *Eagle River Adjudication* the Justice Department made no reference to the Indian rights in the tributaries of the Colorado River. It asserted only the "Reserved rights" of the Nation for the National Forests and the Bureau of Land Management. That case thus becomes the classic example of the conflicts of interest within the Department of Justice. It ignores completely the fact that Eagle River and other tributaries are the life blood of the American Indians throughout the Colorado River Basin and that the Indians are invaluable rights in those tributaries.

Confronted with adverse rulings in the *Eagle River Adjudication*, holding that 43 U.S.C. 666 awarded jurisdiction to the State courts, this proposition was made to the Supreme Court of Colorado:⁸

"It should be pointed out, of course, that if this Court were to find that this Application and its supporting brief misstate Colorado law and were to hold that the United States could adjudicate all of its rights in proceedings such as this and obtain the true priority date of its reserved and appropriative rights, most of the objections of the United States to these adjudications would be removed. While the United States could not, even then, be joined as a defendant under 43 U.S.C. sec. 666, for the reason that an entire river system would not be involved, the United States would be assured it could have its rights properly adjudicated if it chose to appear as plaintiff in a Colorado Water District adjudication. While no

⁸United States v. The District Court in * * * County of Eagle * * * Appendix, page 14.—No. 87 * * * October Term 1970.

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representation can be made at this time as to what the United States would do in any particular case, it can be represented that the Department of Justice would raise no general objection to appearances as plaintiff in appropriate cases under the supposed circumstances." (Emphasis supplied)

The proposition must be viewed on this background:

(a) Only Forest Service rights and Bureau of Land Management rights would be presented;

(b) On the western slope of Colorado there are at least eleven other Water Districts involving State adjudications comparable to the *Eagle River Adjudication*, which would benefit from the Justice proposition, indeed that proposition specifically relates to at least three other State court adjudications;⁹

(c) No mention is made of the downstream rights of the Indians the very existence of which is predicated upon the Eagle River and other streams, all as emphasized above.

Should the Justice Department proceed to fulfill its offer to the Colorado Court, the Indians in the Colorado River Basin would suffer irreparable and lasting damage.

Every phase and aspect of the *Eagle River Adjudication* reviewed at some length above, has been thoroughly researched. If this Committee desires a presentation of that research and documentation supporting the conclusions expressed, it will be presented upon request and made a part of this statement.

⁹Note: 1969 changes in the administration of rights to the use of water in the State of Colorado in no way change the basic concepts set forth in this statement.

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Supreme Court, U.S.

FILED

OCT 7 1970

E. Robert Seaver, Clerk

In the Supreme Court of the United States, October Term, 1970, No. 812.

United States of America, Petitioner v. The District Court in and for Water Division No. 5, State of Colorado, and the Judge Thereof, the Honorable Clifford H. Darrow, and the Water Referee Thereof.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF
COLORADO

* * * * *

The Solicitor General, on behalf of the United States, petitions that a writ of certiorari be granted to review the judgment of the Supreme Court of the State of Colorado entered in this case on July 9, 1970.

OPINION BELOW

The Colorado Supreme Court did not render any opinion. The opinion and order of the Water Court (App. B, *infra*, pp. 10-13) are not reported.

* * * * *

QUESTIONS PRESENTED

[See *supra* this APPENDIX page 1]

* * * * *

STATUTE INVOLVED

[See *supra* this APPENDIX pages 1 and 2]

* * * * *

STATEMENT

On February 11, 1970, the Attorney General received a notice, pursuant to the Colorado Water Right Determination and Administration Act of 1969, Colo. Rev. State., 148-21-1 *et seq.*, directed to "all persons interested in water applications in said water division No. 5," that "the following is a resume of all applications filed in the office of the water clerk during the month of December, 1969" (App. A, *infra*, p. 9). There followed a list of water right applications giving brief descriptions of the water use. The notice concluded with the statement that "[y]ou are further notified that you have until the last day of March, 1970, to file a verified statement of opposition to any such application, if you desire to oppose any such applications." Similar notices have been received listing water right applications filed during each month thereafter. In addition, the Attorney General received similar resumes of applications filed in Water Divisions 4 and 6 during the month of December 1969.

In response to the December 1969 notice, the United States filed with the Water Court of Water Division 5 a motion to quash service on the grounds, *inter alia*, that the proceedings before the water court did not constitute the type of water rights adjudications with respect to which the United States had consented to be sued under 43 U.S. 666. (sic) The water court denied the government's motion (App. B, *infra*, pp. 10-13). It recognized that the consent issue is presently before this Court in *United States v. The District Court in and for the County of Eagle and the State of Colorado*, No. 87, this Term, certiorari granted, 397 U.S. 1005, a case arising from an earlier Colorado water rights proceeding involving a portion of the same water rights here

involved. The court was of the view that it was bound by the decision of the Colorado Supreme Court in *Eagle County* unless and until that decision was overturned by this Court (App. B, *infra*, pp. 12-13). Subsequently, the government's request to extend the time within which to file an answer pending the resolution of *Eagle County* was also denied. Finally, the government applied to the Colorado Supreme Court for a writ of prohibition to stay the proceedings, which the latter court denied on July 9, 1970 (App. C, *infra*, p. 14).

In *Eagle County*, the United States was joined as a defendant to a supplemental water adjudication proceeding for Water District 37, one of the then 70 water districts in Colorado. Subsequent to the Colorado District court's denial of the government's motion to dismiss that action for lack of jurisdiction, the Colorado Water Right Determination and Administration Act of 1969 was passed abolishing¹ the 70 water districts and replacing them with seven water divisions. Water Division No. 5 includes the area drained by the Colorado River and its tributaries (excluding the Gunnison River), which also includes the former Water District 37 involved in the *Eagle County* case.

The water rights of the United States within the expanded area, however, are vastly more numerous than those involved in the *Eagle County* case. The Forest Service administers four separate national forests in the area: the White River, Arapaho, Routt, and Grand Mesa-Uncompahgre. The Department of the Interior, through the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the Bureau of Mines, and the Bureau of Sport Fisheries

¹This footnote omitted here.

and Wildlife, make use of water in Water Division No. 5 for national recreational and other purposes. The Department of the Navy administers certain Naval Petroleum and Oil Reserves which, if ever developed, would require water to accomplish the federal purpose for which the reservation was made.

As in the former Water District 37, the United States claims two types of rights in the larger Water Division No. 5: *appropriative* rights acquired pursuant to state law, and *reserved* and other rights based on federal law, resulting principally from withdrawals of land from the public domain.

REASONS FOR GRANTING THE WRIT

This case raises in a somewhat different factual context the same issues involved in *Eagle County*, No. 87, this Term. The statutory water adjudication procedures underlying the decision below, however, are the ones now prevailing in Colorado and will govern future state proceedings affecting the vast water interests of the United States in that state. Because the new procedures are significantly different from the repealed procedures from which *Eagle County* arose, this case complements *Eagle County* in an important way and should also be reviewed by this Court.

Two issues are presented in *Eagle County*. The first is whether the consent to be sued embodied in 43 U.S.C. 666 extends to suits against the United States for adjudication of its reserved water rights not predicated on state law; the second is whether a supplemental water adjudication proceeding under the old state law is the type of general water rights adjudication suit contemplated by the consent statute. The first issue is as squarely presented in this case as in *Eagle*

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County and needs no elaboration here. See our brief in *Eagle County*, pp. 10-19.

The second issue in *Eagle County* is here presented in the context of the new state procedures. While some of the defects of the old law have been eliminated (*e.g.*, each of the 70 districts under the old law encompassed only a small segment of a river system), the new procedures are, if anything, more burdensome on the government and bear no similarity to a general adjudication which, in one suit, establishes the rights of all parties *inter sese*. *Dugan v. Rank*, 372 U.S. 609; *State v. Rank*, 293 F.2d 340 (C.A.9); *Miller v. Jennings*, 243 F.2d 157 (C.A.5). See legislative history set forth in our *Eagle County* brief at pp. 12-15.

The new statute contemplates monthly proceedings before a water referee on water right applications. These proceedings do not constitute general adjudications of water rights because all the water users and all water rights on a stream system are not involved in the referee's determinations. The notice of the proceeding is directed only to those parties who may be "interested" in the water applications. The only water rights considered in the proceeding are those for which an application has been filed within a particular month. The only parties before the referee are those who have taken affirmative action to file for a water right or have determined that they "desire" to file a statement in opposition, and even those who have elected to participate are not accorded a hearing on the numerous factual issues these cases necessarily involve. In addition, the Colorado statute, which makes all surface water rights confirmed under the current procedure junior to those awarded in previous district adjudications, necessarily excludes those previously decreed

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water rights from the consideration of the referee. As a result, the only rights before the referee are those which have arisen since the last water proceeding.

The referee's proceeding is thus extremely limited. It is administrative rather than judicial, and involves only a small part of the water rights and parties in the entire water division. Such a proceeding does not constitute a "general adjudication" as intended by Congress in 43 U.S.C. 666. See *Dugan v. Rank, supra*, and *Miller v. Jennings, supra*. And see the discussion in our *Eagle County* brief, pp. 24-30.

* * * * *

* * *

Solicitor General

* * *

October 1970.

* * * * *

APPENDIX B

In the District Court in and for Water Division No. 5, State of Colorado, Case No. Misc. # 1.

In the Matter of the Application for Water Rights, Changes for Water Rights, Etc., Filed in Said Court for the Months of December 1969, and January, 1970.

ORDER

* * * * *

This matter came on for hearing and argument before the Court on the 9th day of April, 1970, upon the motion of the United States to quash service. Appearances were as noted on the title and venue page of this Order.

At the conclusion of the hearing, the matter was submitted for consideration and ruling by the Court.

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The grounds of the Government's motion are two:

(1) The proceedings based on said applications do not constitute the kind of water rights adjudication suit with respect to which the United States has consented to be sued.

(2) The purported "service" of the resume does not constitute "service of process" within the meaning and contemplation of 43 U.S.C. Sec. 666 [McCarran amendment].

I

The first ground of the motion has been ruled upon adversely to the Government by the Colorado Supreme Court in an original proceeding. See: the United States of America v. District Court of Eagle County (The Colorado River Water Conservation District, City and County of Denver, Central Colorado Water Conservancy District, and the New Jersey Zinc Company, Interveners), Colo. (1969), 458 P.2d 760.

Certiorari has been issued by the Supreme Court of the United States to the Colorado Supreme Court in that case for a review of its order discharging the rule to show cause why a writ of prohibition should not be issued to the trial court which had ruled that the United States was amenable to its jurisdiction in a supplemental general water adjudication being conducted under the Water Act which has since been superseded (except as to pending proceedings thereunder), by a new and different law known as the Water Rights Determination and Administration Act of 1969, under which these instant proceedings are pending.

The prohibition proceeding in the Colorado Supreme Court was heard and ruled upon under the earlier water law (C.R.S. 1963, 148-9-7).

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In our opinion, the *ratio decidendi* of the Colorado Supreme Court is equally applicable to proceedings for which provision is made by the 1969 Act as concerns the Government's contention stated in sub-division (1) of the motion to quash. Perhaps to greater degree, because the jurisdiction of the Court for Water Division No. 5 extends to a much larger area than the former water district which is involved in the case on certiorari and which is now included within Water Division No. 5.

* * * * *

III

It might be said that there should be a present suspension of a ruling by this Court upon the motion to quash, inasmuch as the disposition of the original proceeding in the Colorado Supreme Court has been challenged in the highest Court in the land.

We are bound by and must follow, however, the rule of decision as enunciated by the highest Court of this state, while also being bound by the Supremacy Clause of the United States Constitution.¹ When we consider the waiver of immunity created in 43 U.S.C. 666, we do not find in the matter before this Court any conflict with the Supremacy Clause of the Constitution of the United States.

We shall treat the Colorado Water Rights and Determination Act of 1969, as a matter of local concern in which federal sovereign immunity has no place, unless and until the higher Courts of Colorado, or the federal jurisdiction, shall hold otherwise.

For the reasons stated, we must overrule the motion to quash.

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It is so ordered.

The Court will entertain, where appropriate, applications by the United States for reasonable extensions of time.

Done at Chambers in the City of Glenwood Springs, Colorado, this 21st day of April, 1970.

* * * * *

APPENDIX C

In the Supreme Court of the State of Colorado,
24821.

The United States of America v. The District Court
in and for Water Division No. 5, State of Colorado
and the Judge Thereof, the Honorable Clifford H. Dar-
row, and the Water Referee Thereof.

Application for Writ in the Nature of Prohibition

ORIGINAL PROCEEDING

Upon consideration of the application of the
United States of America for writ in the nature of
prohibition, together with the pleadings filed, it is this
day ordered that said application be, and hereby is,
denied.

BY THE COURT, EN BANC, July 9, 1970.

TELEGRAM

* * * OCT 21 504PPDT [1970]

ERWIN N GRISWOLD

OFFICE OF THE SOLICITOR GENERAL OF THE
UNITED STATES

3900 WATSON PLACE WASH DC

THE AGUA CALIENTE BAND OF MISSION INDIANS DOES HEREBY REQUEST IMMEDIATE RIVER ADJUDICATION NOW PENDING BEFORE UNITED STATES SUPREME COURT TAKEN OFF CALENDAR. THIS REQUEST IS PREDICATED UPON THE FACT THAT IRREPUTABLE (sic) HARM AND DEPRIVATION OF LEGAL RIGHTS TO OUR TRIBE AND OTHER INDIAN TRIBES COULD RESULT THEREFROM IN AS MUCH AS AN ADVERSE DECISION COULD GIVE RISE TO A PRECEDENT AND SUBJECT INDIAN RIGHTS TO STATE COURTS AND LAWS IN SUCH A MANNER AS TO OBVIATE THE PRESENT PROTECTIVE FEDERAL LAWS AND REGULATIONS ENACTED FOR THE BENEFIT AND ASSISTANCE OF INDIANS. UNDER 43 USC 666 THERE CAN BE NO WAIVER OF IMMUNITY FROM SUIT RESPECTING INDIAN RIGHTS AND THE FAILURE OF THE JUSTICE DEPT TO DISTINGUISH INDIAN PRIVATE RIGHTS HELD IN TRUST BY THE UNITED STATES IN SAID EAGLE RIVER ADJUCITAION (sic) FROM FEDERAL RIGHTS HELD FOR THE BENEFIT OF

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THE PUBLIC CONSTITUTES A FURTHER
THREAT TO THE PRESENT STATUS OF IN-
DIANS THROUGHOUT THE COUNTRY.

LARRY N OLINGER

CHAIRMAN OF THE AGUA CALI-
ENTE BAND OF MISSION INDIANS
TRIBAL COUNCIL

RAYMOND SIMPSON

SUITE 406 SEC BANK BLDG
110 PINE 90802 [LONG BEACH]

TELEGRAM * * *

OCT 22 PM 9 35 [1970]

ERWIN N GRISWOLD

OFFICE OF SOLICITOR GENERAL OF UNITED
STATES

3900 WATSON PLACE WASH DC

THE FORT MOJAVE TRIBE REQUESTS THAT
YOU OFFICE SEEK TO HAVE EAGLE RIVER
ADJUDICATION NOW PENDING BEFORE THE
UNITED STATES SUPREME COURT TAKEN OFF
CALENDAR. THE INTEREST OF OUR TRIBE
ARISE FROM THE FACT THAT THE EAGLE
RIVER IS A PRINCIPAL TRIBUTARY OF THE
COLORADO RIVER IN WHICH WE HAVE A VI-
TAL AND CONTINUING INTEREST. OUR INTER-
EST WAS HIGHLIGHTED BY THE UNITED
STATES SUPREME COURT IN ARIZONA V CALI-
FORNIA WHEN THE COURT NOTED THAT OUR

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TRIBE POSSESSES PRIOR AND PREFERENTIAL RIGHTS WITH THE RESPECT TO THE WATER OF THE COLORADO RIVER 70 PERCENT OF ALL THE WATER IN THE COLORADO RIVER LIES IN THE STATE OF COLORADO WITH THE EAGLE RIVER BEING THE PRINCIPAL TRIBUTARY. IT THEREFORE SEEMS IMPERATIVE THAT SAID EAGLE RIVER JUDICATION BE TAKEN OFF CALENDAR BECAUSE OUR INTEREST AND POSITION HAS NOT BEEN PRESENTED TO THE COURT. WE ARE FULLY AWARE OF THE OCTOPUS-LIKE TENTACLES BELONGING TO ADVERSE INTERESTS THAT SEEK TO IGNORE AND DESTROY OUR WATER RIGHTS BY FORCING (?) US UNDER STATE LAW. WE THEREFORE URGENTLY REQUEST THAT YOU ACT UPON OUR REQUEST FOR THE MATTER TO BE TAKEN OFF CALENDAR.

MINERVA JENKINS
CHAIRMAN FORT MOJAVE TRIBAL COUNCIL

RAYMOND C SIMPSON
406 SECURITY BANK BLDG
110 PINE AVE L BCH 90802

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OFFICE OF THE SOLICITOR GENERAL
Washington, D. C. 20530

October 27, 1970

Mr. Larry N. Olinger
Chairman
Agua Caliente Band of Mission
Indians Tribal Council
Long Beach, California

Dear Mr. Olinger:

I received your telegram of October 22, 1970, expressing your concern about the Eagle River litigation pending in the Supreme Court (Nos. 87 and 812, this Term). In these cases, the Supreme Court of the State of Colorado ruled (contrary to the contention of the United States) that the courts of that State have jurisdiction to determine all rights to the water of the river, including rights based on federal law. The United States has taken these cases to the Supreme Court for a ruling on our contention that the state courts are without jurisdiction to determine water rights based on federal law (including any Indian rights that may be involved).

If, as suggested in your telegram, the United States were to remove these cases from the Supreme Court calendar, the result would be to leave the determination of water rights based on federal law (including Indian rights) under the jurisdiction of the Colorado courts, rather than the federal courts. We do not understand how this would be beneficial to the interests of your tribe; indeed, we believe it would be harmful to those interests.

As you know, the Department of Justice has important responsibilities for the protection of Indian

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rights. We are not aware of any Indian water rights directly involved in this litigation, but we would appreciate detailed information concerning how the litigation might affect any Indian water rights of which you are cognizant so that we may advise the Court of them during the argument of the cases.

Very truly yours,
(Sgd.) Erwin N. Griswold
Erwin N. Griswold
Solicitor General

OFFICE OF THE SOLICITOR GENERAL
Washington, D. C. 20530

October 27, 1970

Miss Minerva Jenkins
Chairman
Fort Mojave Tribal Council
Long Beach, California

Dear Miss Jenkins:

I received your telegram of October 22, 1970, expressing your concern about the Eagle River litigation pending in the Supreme Court (Nos. 87 and 812, this Term). In these cases, the Supreme Court of the State of Colorado ruled (contrary to the contention of the United States) that the courts of that State have jurisdiction to determine all rights to the water of the river, including rights based on federal law. The United States has taken these cases to the Supreme Court for a ruling on our contention that the state courts are without jurisdiction to determine water rights based on federal law (including any Indian rights that may be involved).

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If, as suggested in your telegram, the United States were to remove these cases from the Supreme Court calendar, the result would be to leave the determination of water rights based on federal law (including Indian rights) under the jurisdiction of the Colorado courts, rather than the federal courts. We do not understand how this would be beneficial to the interests of your tribe; indeed, we believe it would be harmful to those interests.

As you know, the Department of Justice has important responsibilities for the protection of Indian rights. We are not aware of any Indian water rights directly involved in this litigation, but we would appreciate detailed information concerning how the litigation might affect any Indian water rights of which you are cognizant so that we may advise the Court of them during the argument of the cases.

Very truly yours,

[Sgd.] Erwin N. Griswold
Erwin N. Griswold
Solicitor General

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

November 6, 1970

Miss Minerva Jenkins
Chairman
Fort Mojave Tribal Council
Needles, California

Dear Miss Jenkins:

I received your telegram of November 4, 1970, yesterday, and I am grateful for its clarification of your

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views with respect to the Eagle River litigation (Nos. 87 and 812, this Term).

Your attorney, Mr. Raymond C. Simpson, conferred with Mr. Lawrence G. Wallace of my staff about this matter today. Mr. Wallace found Mr. Simpson's suggestions most helpful; and Mr. Simpson promised to furnish us additional materials and information for use in the future briefing and argument of these cases, which we very much appreciate.

Please be assured that the government intends to make the Supreme Court fully aware of its obligations as trustee of Indian rights in this matter, and of any bearing that the decision may have on those rights.

Very truly yours,

[Sgd] Erwin N. Griswold

[Sgd.] Erwin N. Griswold

Solicitor General

Friday, November 13, 1970

SUPREME COURT OF THE UNITED STATES

Present: Mr. Chief Justice Burger, Mr. Justice Black, Mr. Justice Douglas, Mr. Justice Harlan, Mr. Justice Brennan, Mr. Justice Stewart, Mr. Justice White, Mr. Justice Marshall, and Mr. Justice Blackmun.

Orders in Pending Cases

* * * * *

No. 87. United States, petitioner, v. District Court in and for the County of Eagle and State of Colorado et al.; and

No. 812. United States, petitioner, v. The District Court in and for Water Division No. 5, State of Colorado, et al. The application of the Solicitor General,

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consented to by all parties concerned, for a stay of the Colorado State Court proceedings before the District Court in and for Water Division No. 8, (sic) presented to Mr. Justice White, and by him referred to the Court, is granted insofar as such proceedings involve an adjudication of the rights of the United States, pending the decision of this Court in No. 87, and in No. 812 presently pending on a petition for a writ of certiorari.

FORT MOJAVE TRIBAL COUNCIL

California-Arizona-Nevada

P.O. Box 398
Needles, Ca 92363

LOC: 520 Courtwright Street
Indian Village
Phone: 713 326 3844

November 16, 1970

Mr. Pat Patencio
587 South Palm Canyon Drive
Palm Springs, California 92262

Dear Mr. Patencio:

I am enclosing a copy of a letter I have sent to the Navajo, Southern Ute, Ute Mountain, Uintah and Ouray, Chemehuevi, Hualapai, Havasupai, Colorado River, Cocopah and Quechan Tribes concerning the Eagle River case now before the Supreme Court.

As chairman of the group that met in Phoenix, you can be of help to us by getting together a meeting to discuss the need for having Indian interests advocated now, without waiting for legislation which may come too late for many of the cases that are pressing now;

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the legislation may never be passed and we need to face that fact.

Will you please distribute my letter to other tribes and consider setting up a meeting such as suggested?

Sincerely yours,

(sgd.) Minerva Jenkins

Mrs. Minerva Jenkins

Chairman

Encl

FORT MOJAVE TRIBAL COUNCIL

P.O. Box 798

Loc:-520 Courtwright Street

Indian Village

Needles, Ca. 92363

November 16, 1970

Dear Mr. Chairman:

The purpose of this letter is to call to your attention the case, Eagle River Adjudication, Nos. 87 and 812, pending in the supreme Court this term. This is an important matter that is of vital interest to Indian tribes that have rights to water of the Colorado River. In its broader aspects it should also be of interest to other tribes.

The Eagle River in Colorado is a tributary of the Colorado River. The Supreme Court of the State of Colorado had ruled in two cases that the State courts of Colorado have jurisdiction to determine all rights to the water of the Eagle River, including rights based on Federal law.

The Solicitor General in the Department of Justice, acting on behalf of the United States, has taken these cases to the Supreme Court.

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In doing this, though, the Justice Department did not assert the private rights of Indians held in trust by the United States; instead, it asserted the interests of the Government and attempted to join Indian interests with the Government interests.

You will recall that in his July 8 message to the Congress, the President in condemning the conflict of interest within the Justice and Interior Departments, pointed out very clearly that the rights of Indians and the rights of the United States are not one and the same thing. The President made the distinction in these words:

"The Secretary of the Interior and the Attorney General must at the same time advance *both* the *national* interest in the use of land and water rights *and* the *private* interests of Indians in land which the Government holds as trustee." (Emphasis by the President) After an exchange of correspondence with Mr. Erwin Griswold, the Solicitor General, Department of Justice, the Fort Mojave Tribe has been given the opportunity to make our interests in the *Eagle River* case known to the Justice Department prior to the argument of the case before the Supreme Court.

Tribes that have interests in water of the Colorado River and its tributaries are urged to join our Tribe by having your attorneys make your concern known to Mr. Griswold.

Other tribes should, if they share our view, let the President and the Vice President know that the Justice Department did not in this case, except upon prompting by us, recognize the distinction between the Government's and the Indians' interests. This case provides a good example of the need for the Indian Trust Coun-

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sel Authority legislation the President proposed; but, it also points out very dramatically the need for immediate Executive action to assure advocacy now for the Indian interests.

Sincerely yours,

FORT MOJAVE TRIBAL COUNCIL
Mrs. Minerva Jenkins
Chairman

Law Offices of
RAYMOND C. SIMPSON
Suite 406 Security Bank Building
Long Beach California 90802
Telephone Hemlock 5-8303

November 20, 1970

Mr. Erwin N. Griswold
Office of the Solicitor General
Washington, D. C. 20530
ATTENTION: Mr. Wallace

Gentlemen:

Re: Eagle River Litigation

Let me thank you for the courtesy extended me during my trip of a couple of weeks ago to Washington, D. C.

The primary purpose in writing this letter is to confirm my understanding that you agree with my basic position that Indian lands are privately owned lands held in trust by the United States of America for the benefit of the Indians, which, of course, means they are not embraced within the purview of statutes governing public lands. For this reason, it is critically important that the Supreme Court by (sic) made cognizant to the

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fact that an adverse decision in cases No. 87 or 812 for this term would result in an unjustifiable servitude upon the privately owned land and water of Indians. In other words, Indian trust lands cannot be permitted to come under state court jurisdiction in any determination of the Indian rights therein without resulting in a great loss and unrepairable damage with disastrous consequences to the Indians.

In keeping with my representation to you, and with my understanding that the cases will not be argued for three or four months, I will be transmitting a written statement pertaining to the Indian interest in the above-entitled litigation in the very near future.

Very truly yours,

[Sgd.] Raymond C. Simpson
RAYMOND C. SIMPSON

RCS/mh

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Law Offices of
RAYMOND C. SIMPSON
Suite 406 Security Bank Building
Long Beach California 90802
Telephone Hemlock 5-8303

November 28, 1970

Hon. Irwin N. Griswold
Solicitor General
Department of Justice
Washington, D. C. 20530

RE: Fort Mojave Indian Rights in
Eagle River Adjudication—
AMERICAN INDIAN
CRISIS on the Colorado
River

Dear Sir:

This will refer to my letter to you dated November 20, 1970, in regard to the above entitled matter. That letter specifically raised the issue of the threat stemming from failure to bring to the Supreme Court's attention the fact that Indian rights to the use of water are private in character and held in trust for the Indians, with the United States as trustee. Secondly, in view of that fact the waiver of sovereign immunity set forth in 43 U.S.C. 666 could not possibly have any application to those Indian rights. In the paragraphs which succeed the general objections to the present posture of the cases here involved will be discussed in more detail. By reason of earlier discussions with a representative of your office, I have not felt it essential to do more than present the objections to the cases in question by the Fort Mojave Indian Tribe without going into extensive detail in connection with the proceedings in the

District and Supreme Court of the State of Colorado which gave right (sic) to the review of those matters by the Supreme Court of the United States.

In that letter I referred to the case entitled: United States Petitioner v. The District Court in and for the County of Eagle and State of Colorado in the Supreme Court of the United States "No. 87, October Term 1970". Subject matter of the case originally initiated in the State Court of Eagle County, Colorado, are the rights to the use of water for the Eagle River. It is a principal tributary of the Colorado River within the State of Colorado.

Reference is also made to the Petition for a Writ of Certiorari filed October 7, 1970, by the United States. That case is entitled United States of America, Petitioner v. The District Court in and for Water Division No. 5, State of Colorado** No. 812, October Term 1970. Subject matter of the case as described in the Petition for a Writ of Certiorari are the rights for the use of water in Water Division No. 5. That water division encompasses the Eagle River referred to above and also according to the Petition of the United States * * * "the area drained by the Colorado River and its tributaries (excluding the Gunnison River)"**.

Succinctly stated, Water Division No. 5 recently established by the State of Colorado for the adjudication and administration of rights to the use of water under the jurisdiction of the State and its Courts. You chronicle the many and various agencies of the United States claiming rights to the use of water in that all important and large area which produces an extremely high proportion of the water supply of the Colorado River. As set forth in the Petition, those Federal Agencies include (1) the Department of the Interior; Bureau

of Reclamation, National Park Service, Bureau of Land Management, Bureau of Mines, Bureau of Sports, Fishery and Wild Life. (2) the Department of Agriculture; Forest Service. (3) The Department of the Navy which administers the naval petroleum and oil reserves. It is also stated in the Petition involving Water Division No. 5 that as in the Eagle River adjudication, Case No. 87, the United States claims appropriative rights pursuant to state law and also reserved and other rights to the use of water based upon Federal Law.

FORT MOJAVE TRIBE HAS DIRECT AND IMMEDIATE INTEREST IN THE SUBJECT MATTER OF CASES NO. 87 AND 812—IS GRAVELY THREATENED BY OMISSION OF INDIAN INTEREST IN THEM.

Since time immemorial the Mojave Indians have beneficially used the waters of the Colorado River to provide for their sustenance. That water is no less a part of their lives and heritage than the air they breathe. In fact, so significant is this that the origin of their Indian name "Aha-Ma-Cave" has been determined by outstanding anthropologists and archaeologists to mean "People of the River".

The Fort Mojave Tribe has had decreed to it the rights of the use of water from the mainstream of the Colorado River to irrigate a total of 18,974 irrigable acres. Their legal rights to the use of water for that acreage accords to them an entitlement of 122,640 acre feet of water annually. Recovery of possession of a very substantial irrigable acreage within the Fort Mojave Indian Reservation is expected which will materially increase their irrigable acreage with an attendant enhancement of their legal entitlement from the

mainstream of the Colorado River as decreed to them in the case of *Arizona v. California*, 373 U.S. 549 (1963).

It is understood that 70% of all the waters flowing to the Fort Mojave Indian Reservation of the mainstream of the Colorado River arises in the State of Colorado. A large proportion of that water has its source within Water Division No. 5 which is involved in case No. 812. A very substantial part of that water so essential to the Fort Mojave Rights is the Eagle River, which is the subject of the adjudication in case No. 87.

Of necessity the Fort Mojave Indian Tribe must have asserted its rights in the tributaries to the mainstream of the Colorado for without the water from those tributary streams, and particularly those in Water Division No. 5 and Eagle River, its rights would be most seriously invaded. Without those sources of water the Mojave rights would, of course, be vacuous as the entitlement in the mainstream of the Colorado River held by the Mojave is totally dependent upon the water supplied by the tributaries.

**FORT MOJAVE INDIAN TRIBE THREATENED
BY SHORTAGE OF WATER IN THE COLO-
RADO RIVER AND THE POLLUTION OF
THAT STREAM.**

Any decree which might be entered in either the Eagle River Adjudication or in Water Division No. 5 can have no other effect than to establish uses of the waters within those tributary areas. That upstream use will materially reduce the quantities of water entering the Colorado River which would otherwise flow to the Fort Mojave Indian Reservation. It is a matter of indisputable record that the Colorado River has been

most seriously over-appropriated. Water yields from the Colorado River reaching the Fort Mojave Indian Reservation fall far short of the anticipated flows when the River was originally apportioned between the Upper and Lower Basins of the Colorado.

A threat equally serious to the Fort Mojave Indians as the grave shortage of water now confronting them is the pollution of that stream. Salinity has increased very rapidly in the Colorado River due to reservoir evaporation losses and the salts which enter that River under present development. Projects are now building—particularly the Central Arizona Project—which constitute an even greater threat both as to quantity and quality of the water if those projects proceed to completion.

As a consequence, any reduction of water in the Colorado River by reason of tributary uses and Water Division No. 5 creates an intolerable situation. Manifestly the decrees in the State of Colorado must be entered in contemplation of the fact that the Fort Mojave Indian Tribe, and indeed many other tribes within the Colorado River drainage, hold legal rights to the use of water, which rights must be protected.

**FORT MOJAVE INDIANS' RIGHTS IN THE
COLORADO RIVER AND ITS TRIBUTARIES
—PRIVATE INTERESTS IN REAL PROPERTY
HELD IN TRUST FOR THEM BY THE
UNITED STATES.**

It is of course elemental that the rights to the use of water by the Fort Mojave Indian Tribe and the Colorado River and its tributaries are interests in real property of the highest dignity. Those rights, as asserted above, although in the mainstream of the Colorado

River, necessarily extend to the sources of water which are the tributaries of that stream including in particular the mainstream and the tributaries in Water Division No. 5 and, of course, the Eagle River.

President Nixon in his July 8, 1970, Message to the Congress, stressed that the American Indian rights to the use of water are "private" in character, held in trust for them by the United States. The Mojave rights are not "public" in character. They are distinct and separate from the rights claimed and administered by the agencies of the Department of the Interior, Agriculture, and Navy alluded to in the Petition for Certiorari and Water Division No. 5. That distinction is also of course equally applicable to the Eagle River Adjudication in which the only claims asserted by the United States pertain to the Forest Service and the Bureau of Land Management.

**FAILURE IN EAGLE RIVER ADJUDICATION NO.
87 PROPERLY TO ASSERT OR IDENTIFY
THE INDIAN RIGHTS TO THE USE OF WAT-
ERS IN THAT STREAM AS BEING HELD IN
TRUST FOR THE FORT MOJAVE INDIANS.**

There has been a failure to distinguish or to indeed make reference to the private rights of the Fort Mojave Indians in the Eagle River Adjudication. A similar omission is likewise made in the Petition for Certiorari in the Water Division No. 5 Case No. 812.

That failure is all pervasive. It is exemplified in this quoted excerpt from the Petition of Certiorari filed in that case: "Reserved rights (of the United States) have been defined by this Court as the entitlement of the United States to use as much water from sources on land withdrawn from the Public Domain as is necessary

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to fulfill the purposes for which the lands were withdrawn, subject only to the water rights vested as of the date of the withdrawal. Arizona v. California, 373 U.S. 546, 595-601", Petition for Writ of Certiorari** Case No. 87, p. 3 That paraphrasing of the decision of Arizona v. California last cited is most critical to the Fort Mojave Tribe. Most assuredly the Mojave rights are not an "entitlement of the United States to use**" water. Rather as the citation when considered in context revealed that the Mojave and other Indian rights to the use of water are recognized and distinguished from those of the United States for public purposes.

Again failure to establish the all important difference between the "private" rights of the Indians held in trust for them by the United States from those of the Federal Government held for the public as a whole is this statement from the brief filed with the Supreme Court: "As indicated previously** the United States unquestionably has the right to use as much water from sources on lands withdrawn from the Public Domain as is necessary to fulfill the purposes for which the lands were withdrawn**". Not only is the statement incorrect, it is to be noted that there are four cases cited in the brief to support the contention. Three of the cases relate exclusively to Indian rights and the fourth relates predominantly to Indian rights. Brief for the United States, Case No. 87, p. 10, all of which underscores the imperative deed clearly to distinguish the Indian rights from those of the public.

In keeping with the tone and temper of the erroneous excerpt quoted from the Petition of Certiorari and the briefs filed in case No. 87 is this excerpt taken from the Petition and paraphrased in the brief: "The magni-

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tude of the problem is indicated by the fact that about four hundred forty-three million acres have been withdrawn from the Public Domain for use as Indian reservations, national parks, national forest, national recreation areas, national monuments, etc." Petition for Certiorari** P. 10-11. Failure to separate and distinguish the lands of the American Indians from the public lands evidences the incorrect position which has been presented to the Supreme Court in regard to the private interests of the Indian. From the legal aspects of the matter an intolerable circumstance is presented not only for the Fort Mojave Indian Tribe but also for all American Indians whose lands and rights to the use of water are in effect intermingled with the "reserve" lands and rights to the use of water for the public at large.

FAILURE TO ASSERT IN CASES NOS. 87 AND 812 THAT THE WAIVER OF SOVEREIGN IMMUNITY FROM SUIT IN 43 U.S.C. 666 DID NOT INCLUDE THE RIGHTS TO THE USE OF WATER OF THE FORT MOJAVE TRIBE OF INDIANS OR INDEED THE RIGHTS OF ANY OTHER INDIANS—A MOST SERIOUS THREAT TO THE INDIANS.

Gravest consequence to the Fort Mojave Tribe of Indians will necessarily ensue by the failure of the petitions for certiorari and the brief in the Eagle River Adjudication to emphasize to the Supreme Court that the waiver of sovereign immunity from suit in 43 U.S.C. 666 does not in any way pertain to the Indian rights

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and (sic) to the use of water. It is basic law that unless the Indian immunity from suit is specifically waived by the Congress that immunity is unimpaired. From the language of 43 U.S.C. 666 it is abundantly manifest that the Congress did not intend to include the rights of the American Indians within the scope of that waiver. If construction of the Act were permissible, which is denied, the legislative history would result in the rejection of any concept as to the applicability of the Act to the Indian rights and interests.

Failure to distinguish the Indian rights from the public rights of the Federal Government might very well result in a decision by the Supreme Court that could be construed as embracing those rights within 43 U.S.C. 666. Quite clearly that would be intolerable to the Indians. The result might be to subject the rights of the American Indians to the administration of the state under the laws of the states. Because of the state laws governing rights to the use of water are frequently incompatible with the laws which govern the Indian rights to the use of water, the extreme prejudice to the Indian rights is clear beyond question. In short, the repeated failure to bring to the Supreme Court's attention the disparity between the laws governing the Indian rights and the laws governing the public rights of the United States could result in serious impairment or extinguishment of the Indian rights. It is not an over statement to declare that the Indian lands to a large extent would become uninhabitable if those rights were seriously infringed upon or, as stated, extinguished.

SUGGESTION TO THE SUPREME COURT OF COLORADO THAT THE UNITED STATES WOULD VOLUNTARILY APPEAR AS PLAINTIFF IN STATE COURT PROCEEDINGS WHOLLY UNACCEPTABLE TO THE FORT MOJAVE INDIAN TRIBE IN THE PRESENT STATE OF THE RECORD.

It was expressly stated by the United States when it was before the Supreme Court of Colorado in the Eagle River Adjudication that it might be willing to appear in the State Court as plaintiff. Any action of that character would, of course, be objectionable to the Fort Mojave Indian Tribe for exactly the same reasons that it has interposed objection by this letter in connection with the brief and petitions of certiorari which have been discussed above. Clearly the interests of the Fort Mojave Tribe would be prejudiced if the United States undertook to appear as plaintiff and failed fully to assert the Indian rights in the tributary streams of the Colorado River. Moreover in the ultimate if the United States were to subject itself to the jurisdiction of the State Court, all of the rights which are involved and there presented would probably be subject to state law and the control and administration of state officials. That circumstance would, as stated, be intolerable to the Indians.

I intend to be in Washington for conferences with officials of the Department of the Interior during the week of December 7, 1970. At that time I would greatly appreciate an opportunity to meet with you and members of your staff. We could then discuss fully the objections which the Fort Mojave Indian Tribe and other tribes adversely affected have to the present situation

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in the cases to which this letter is directed in order to determine what affirmative action should be taken to protect the Indian rights involved.

Yours very truly,

[Sgd.] Raymond C. Simpson

RAYMOND C. SIMPSON

Fort Mojave Tribal Attorney

RCS/af

Res. No. 70-23

RESOLUTION

Fort Mojave Tribe
of the Fort Mojave Reservation
California, Arizona and Nevada

Whereas, the Fort Mojave Indian Tribe of the Fort Mojave Indian Reservation has a long established policy with the objective of protecting and preserving the Tribe's rights to the use of water in the Colorado River and their entitlement to water both as to quality and quantity, and

WHEREAS, the Tribe in furtherance of that policy directed its Attorney Raymond C. Simpson to take appropriate steps in regard to protecting the Tribe's rights in the Colorado River and its Tributaries as they may be effected by the case of United States v. District Court of Eagle County, Colorado case No. 87 now before the Supreme Court and the case entitled United States v. District Court for water Division No. 5, No. 812 concerning which the United States is now seeking review by the Supreme Court,

NOW, THEREFORE, the Tribal Council having fully considered the letter dated November 28,

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1970 directed to the Hon. Erwin N. Griswold, Solicitor General, Department of Justice, which letter was prepared by the above mentioned Attorney Raymond C. Simpson, does hereby approve that letter to which this resolution is attached and hereby directs the foresaid Raymond C. Simpson to proceed in conformity with that letter to take all steps necessary to preserve and protect the Tribe's rights in the Colorado River and its tributaries as they relate to the above mentioned cases including but not limited to attending the proposed conference with the Solicitor General and for all other purposes.

Certification

We, the undersigned, as the chairman and the secretary, hereby certify that the Fort Mojave Tribal Council is composed of six members, of whom five, constituting a quorum, were present at a special meeting on the 30th day of November and that the foregoing resolution was adopted by five affirmative votes.

FORT MOJAVE TRIBAL COUNCIL

(Sgd.) Minerva Jenkins
Minerva Jenkins, Chairman

(Sgd.) Jeannette Otero
Jeannette Otero, Secretary

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OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

December 3, 1970

Raymond C. Simpson, Esquire
Suite 406 Security Bank Building
Long Beach, California 90802

Dear Mr. Simpson:

Thank you very much for your letter to the Solicitor General of November 28, 1970, which we received today. As anticipated in our earlier conversation, the information and views contained in your letter will be helpful in our handling of the Eagle River cases.

The Solicitor General has asked me to handle this matter and to keep him informed about it. I will be happy to see you when you are in Washington during the week of December 7, 1970. The latter part of the week (either Thursday or Friday) will be more convenient for me since I am arguing a case in the Supreme Court on Wednesday (according to the Court's tentative schedule).

Yours sincerely,

(Sgd.) Lawrence G. Wallace
Lawrence G. Wallace
Deputy Solicitor General

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Law Offices of RAYMOND C. SIMPSON
Suite 406 Security Bank Building
Long Beach, California 90802
Telephone Hemlock 5-8303
December 11, 1970

Hon. Irwin N. Griswold
Solicitor General
Department of Justice
Washington, D. C. 20530

RE: Fort Mojave Indian Rights
in Eagle River Adjudication—
AMERICAN INDIAN CRISIS on
the Colorado River.

Dear Sir:

On behalf of the Fort Mojave Tribe, I wish to thank you for the courtesy extended by Mr. Clark of your office during my recent visit to Washington. At that time we discussed in detail the contents of my letter addressed to you dated November 28, 1970, and thereafter expressed a wish to file an Amicus Brief respecting our position in the Eagle River Adjudication.

Hence, pursuant to the suggestion of Mr. Clark, I request that you consider this letter as constituting the formal request of the Fort Mojave Tribe for you (six) consent to file an Amicus Brief in consolidated cases 87 and 812 involving the Eagle River litigation presently pending in the United States Supreme Court.

Thanking you in advance for your anticipated cooperation and permission.

Very truly yours,
(Sgd.) Raymond C. Simpson
RAYMOND C. SIMPSON
Tribal Attorney

RCS/mh

cc: Fort Mojave Tribal Council
Mr. LaFollette Butler
Mr. Bill Veeder

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Telegram

DUPLICATE AND CORRECTED COPY

DEC 14 PM 9 22 (1970)

COMMISSIONER LEWIS BRUCE

BUREAU OF INDIAN AFFAIRS WASH DC
MOJAVE INDIAN TRIBE REQUEST ASSISTANCE
FROM MR. VEEDER IN EAGLE RIVER ADJUDI-
CATION AND IN WATER DIVISION NUMBER 5
ADJUDICATION ARISING IN STATE OF COLO-
RADO AND HIS AUTHORIZATION TO COOPER-
ATE WITH ME IN REGARDS TO THAT LITI-
GATION STOP SHORTAGE OF TIME MAKES
THIS ASSISTANCE AND AUTHORIZATION IM-
PERATIVE IMMEDIATELY.

RAYMOND C. SIMPSON
TRIBAL ATTORNEY
FT MOJAVE INDIANS

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WILKINSON, CRAGUN & BARKER
Law Offices

1616 H Street, N. W.
Washington, D. C. 20006
National 8-4400

* * *

December 22, 1970

The Honorable Irwin H. Griswold
Solicitor General
Department of Justice
Washington, D.C. 20530

Re: Eagle River Adjudication (No. 87) and
Water Division No. 5 Adjudication
(No. 812) In the State of Colorado

Dear Mr. Solicitor General:

We are attorneys for the Arapahoe Tribe of the Wind River Reservation, Wyoming, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the Hoopa Tribe of the Hoopa Valley Reservation, California, the Quinault Tribe of Washington, the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, and the National Congress of American Indians. We have become aware of the Eagle River adjudication (No. 87) and Water Division No. 5 adjudication (No. 812) which are presently pending before the Supreme Court in the United States. The above named tribes as well as the National Congress of American Indians, are gravely concerned that important questions affecting Indian water rights have been raised in the cases without a proper statement of the Indian position on these questions.

We have been supplied with a copy of the letter to you from Mr. Raymond C. Simpson, dated November

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28 1970. We support the general premises urged therein—that the United States has heretofore failed to distinguish the particular “private” rights of Indians to the use of water from rights claimed and administered by various federal agencies characterized as “reserved” rights of the United States. We request that in future briefs filed by the United States in these cases the United States call the attention of the Supreme Court to the error in the statements heretofore made in the briefs filed in Docket No. 87. Moreover, it should be made plain to the Court that, irrespective of its effect on water rights of the United States, Congress never intended in 43 U.S.C. 666 to waive the sovereign immunity of Indian tribes from suit and subject them to the vagaries of state court proceedings with respect to their water rights.

We are advised by Mr. Simpson that he has been invited to file an *amicus* brief on behalf of the Fort Mojave Tribe of Indians. In addition, we understand that it was agreed that Mr. Simpson would submit a memorandum to the Department of Justice and it would be considered before further briefs in these cases are filed by the United States.

Because of the extreme importance of these matters, we would like the opportunity to discuss the Indian water rights questions raised with your staff prior to the completion and filing of any further briefs in these cases.

Sincerely yours,

WILKINSON, CRAGUN & BARKER

By: Glen A. Wilkinson

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WILKINSON, CRAGUN & BARKER
Law Offices

December 22, 1970

The Honorable Louis R. Bruce
Commissioner
Bureau of Indian Affairs, Room 233
1951 Constitution Avenue, N.W.
Washington, D. C. 20242

Re: Eagle River Adjudication and
Water Division #5 Adjudication

Dear Commissioner Bruce:

We are attorneys for the Arapahoe Tribe of the Wind River Reservation, Wyoming, the Hoopa Tribe of the Hoopa Valley Reservation, California, the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, the Quinault Tribe of the Quinault Reservation, Washington, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and the National Congress of American Indians. As you are no doubt aware the Supreme Court has granted *certiorari* in the Eagle River adjudication (No. 87) and the Water Division No. 5 adjudication (No. 812) both in the state of Colorado. Both of these cases involve questions which might seriously affect Indian water rights.

We hope to work with the Department of Justice to assure that the position of the Indians is not neglected in these briefs. In that regard, we hereby request assistance from Mr. William Veeder in our work concerning the Eagle River adjudication and the Water Division No. 5 adjudication. Furthermore, we request that he be authorized to cooperate with us on that litigation.

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We enclose a copy of a letter we have sent today to the Solicitor General concerning these cases.

Since the writ of *certiorari* was granted in Water Division No. 5 adjudication on December 7, 1970, time is of the essence. We look forward to hearing from you on this matter very soon.

Sincerely yours,

WILKINSON, CRAGUN & BARKER

(Sgd.) Glen A. Wilkinson

By: Glen A. Wilkinson

Enclosure

[Filed January 14 1971]

In the Supreme Court of the United States October Term, 1970 No. 812.

United States of America, Petitioner v. The District Court in and for Water Division No. 5, State of Colorado, and the Judge Thereof, the Honorable Clifford H. Darrow, and the Water Referee Thereof.

On Writ of Certiorari to the Supreme Court of the State of Colorado.

BRIEF FOR THE UNITED STATES

* * * * *

QUESTIONS PRESENTED

[See *supra* this APPENDIX page 1]

* * * * *

STATUTES INVOLVED

[See *supra* this APPENDIX pages 1 & 2]

* * * * *

The Colorado Water Right Determination and Administration Act of 1969, Colo. Rev. Stat. 148-21-1 *et seq.* provides in pertinent part:

148-21-3. Definitions.—(1) For the purposes of this article, unless the context clearly indicates a different meaning:

(2) "Person means an individual, a partnership, a corporation, a municipality, the state of Colorado, the United States of America, or any other legal entity public or private.

* * * * *

148-21-18. Applications for water rights or changes of such rights—plans for augmentation.

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—(1) Any person who desires a determination of a water right or a conditional water right and the amount and priority thereof including a determination that a conditional water right has become a water right by reason of the completion of the appropriation, a determination with respect to a change of a water right, approval of a plan for augmentation or biennial finding of reasonable diligence, shall file with the water clerk in duplicate a verified application setting forth facts supporting the ruling sought. Any person who wishes to oppose the application may file with the water clerk in duplicate a verified statement of opposition setting forth facts as to why the application should not be granted or why it should be granted only in part or on certain conditions. Such statement of opposition must be filed by the last day of the second month following the month in which the application is filed. The fee for filing an application shall be twenty-five dollars; and for filing a statement of opposition, the fee shall be fifteen dollars.

* * * * *

(4) The referee without conducting a formal hearing shall make such investigations as are necessary to determine whether or not the statements in the application and statements of opposition are true and to become fully advised with respect to the subject matter of the applications and statements of opposition. The referee shall consult with the appropriate division engineer and may consult with the state engineer, the Colorado water conservation board, and other state agencies.

* * * * *

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148-21-22. Priorities junior to prior awards—when.—With respect to the divisions described in section 148-21-8 priorities awarded in any year for water rights or conditional water rights shall be junior to all priorities awarded in previous years and junior to all priorities awarded in decrees entered prior to the effective date of this article or in decrees entered in proceedings which are pending on such date; * * *.

STATEMENT

This case raises essentially the same issues involved in *United States v. The District Court in and for the County of Eagle and State of Colorado* No. 87, this Term, certiorari granted, 397 U.S. 1005, but in the context of the Colorado Water Right Determination and Administration Act of 1969 Colo. Rev. Stat. 148-21-1 *et seq.*, which has superseded the statutory provisions underlying the *Eagle County* case.

* * * * *

* * * Because of the size of new Water Division No. 5, however, the water rights of the United States involved in this case are more numerous than those involved in *Eagle County*.² The Forest Service administers four separate national forests in the area: the White River, Arapaho, Routt, and Grand Mesa-Uncompahgre. The Department of the Interior—through the Bureau of Reclamation, the National Park Service, the Bureau of Land Management, the Bureau of Mines, and the Bureau of Sport Fisheries and Wildlife—uses water in Water Division No. 5 for recreational and other purposes. The Department of the Navy administers certain Naval Petroleum and Oil Re-

²This footnote omitted here.

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serves in the area which, when developed, would require water to accomplish the federal purpose for which the reservation was made.

SUMMARY OF ARGUMENT

We rely primarily on our brief submitted in *Eagle County, supra*, No. 87, this Term, and limit our discussion here to the significance of the changed Colorado water right adjudication procedures. In support of our argument that Congress did not consent to the adjudication of federal *reserved* water rights in state court proceedings, we point out that under the limited procedures of the 1969 Colorado Act, Colo. Rev. Stat. 148-21-1 *et seq.*, it is highly unlikely that the federal reserved rights will be recognized. Because Congress was undoubtedly aware of the fundamental inconsistency between reserved water rights existing under federal law and appropriative water rights—which the laws of the western states are designed to determine and protect—we submit that Congress plainly did not intend through the enactment of 43 U.S.C. 666 to jeopardize federal reserved rights by subjecting them to state adjudications, but intended merely to submit federal claims arising under state law to state procedures.

In Part II, we show that the monthly proceedings of limited scope authorized by the 1969 Colorado statute do not constitute the type of general adjudication to which the United States may be made a party under the federal consent statute.

ARGUMENT

* * * * *

Section 148-21-22 of the 1969 Act provides:

Priorities junior to prior awards—when.—With respect to the divisions described in section 148-21-8, priorities awarded in any year for water

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rights shall be junior to all priorities awarded in previous years and junior to all priorities awarded in decrees entered prior to the effective date of this article or in decrees entered in proceedings which are pending on such date; * * *.

This provision would appear to foreclose as to all unadjudicated federal reserved—as well as appropriative—water rights, the recognition of pre-1969 priority dates. There thus appears to be no means under the 1969 Colorado statute for perfecting federal reserved water rights. This re-emphasizes our submission that an interpretation of 43 U.S.C. 666 as embodying consent to reserved water right adjudication might effectively eliminate federal reserved rights and drastically affect the management of federal lands in Colorado and other western states.³

II

The Monthly Proceedings Authorized By The Colorado Water Right Determination And Administration Act of 1969 Are Not Suits To Which The United States Has Consented To Be Joined Under 43 U.S.C. 666 Regardless Of The Nature Of The Rights Claimed By The United States

Again, we rely primarily on our *Eagle County* brief, in which we argued at pages 24-30 that the Colorado procedures there at issue did not provide for the type of adjudication proceedings covered by 43 U.S.C. 666.

³To the best of our knowledge, none of the reserved water rights claimed by the United States in Water Division No. 5 relate to Indian lands. In the event this Court should rule that 43 U.S.C. 666 subjects federal reserved rights in general to state adjudication, there would remain the further question (not presented by this case) whether the consent statute covers water rights held by the United States in trust for specific Indian tribes—frequently pursuant to treaty—rather than for the benefit of the general public.

In our view, however, the new state procedures authorized by the 1969 Act to determine and administer water rights are even more clearly not within the scope of the federal consent statute than the procedures they supersede.⁴

The Federal courts which have construed 43 U.S.C. 666 have concluded that Congress intended to waive the sovereign immunity of the United States only in general water right adjudications. See *Dugan v. Rank*, 372 U.S. 609, 618-619; *Miller v. Jennings*, 243 F.2d 157, 159 (C.A.5), certiorari denied, 355 U.S. 827; *Eagle County Br.* 25-27. The essential elements of the proceedings to which the United States has consented to be joined as a defendant, as described in these decisions as well as in the legislative history of the federal statute (see our Brief in No. 87, pp. 12-15), are that all the water users and all the water rights on a stream must be joined in the action before the court and all the rights of the parties be determined as between themselves. These elements constitute the essence of a "general adjudication."

The proceedings under the 1969 Act do not approach such a general adjudication. The only water rights involved in the monthly proceedings before the water referee are those for which an application was made during the preceding month and which are listed on the resume prepared by the water clerk. Section 148-21-18. The Act does not require that all or any particular number of claimants to water from a particular or common source be joined, nor does it pro-

⁴One defect of the old procedures have been mitigated, however, since each of the seven new divisions is obviously more likely to encompass a stream system within the meaning of 43 U.S.C. 666 than were any of the 70 districts under the old law.

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vide for a determination *inter sese* of such claims. Neither the statute nor the notice thereunder demands or requires that the United States or any other water user in a division file an application or claim in order that it can be determined along with all others or even those included in the notice. Instead, the statute provides only that (Colo. Rev. Stat. 148-21-18(1)):

Any person who wishes to oppose the application may file with the water clerk in duplicate a verified statement of opposition setting forth facts as to why the application should not be granted or why it should be granted only in part or on certain conditions.

The result of the application and permitted response is that a water referee will consider the particular month's applications and any statements in opposition filed and, without holding a formal hearing, make his ruling.⁵

In the instant case, the notice of applications filed during the month of December 1969 in Water Division 5 and mailed to the Attorney General contained 17 applications (App. 17-25). These 17 applications and any oppositions filed thereto delimit the subject matter of the proceedings before the referee pursuant to this notice. The proceeding is thus limited to a mere fraction of the rights and claimants to water from sources within the area of Water Division 5. Were the United States to respond to the December notice and file a statement in opposition, the result would not be a decree finally determining all of the rights to use water in the division among all claimants, but a ruling

⁵Under Section 148-21-19(2), the referee has the option of referring the matter to the water judge without making a ruling.

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pertaining only to those 17 applications filed. As noted above (*supra*, p. 12), in response to this notice the United States is neither asked nor permitted to submit its claims. For the claims of the United States to be the subject of a decree, the United States must affirmatively initiate a proceeding by filing an application for a water right under Section 148-21-18.

Respondents may assert that there are compelling reasons why the United States should, as a matter of policy, voluntarily submit its claims to state courts for determination.⁶ That question, however, is not before the Court since 43 U.S.C. 666 is clearly not a statute directing the Department of Justice to initiate proceedings on behalf of the United States, but simply permits joinder of the United States as a defendant in proper suits. We submit that the limited monthly adjudication proceedings established by the 1969 Act are not the type of suits covered by the federal consent statute.

* * * * *

* * *

Solicitor General

* * *

January 1971.

⁶See the brief of the State of Wyoming as *amicus curiae* filed in Eagle County, No. 87, this Term. The *amicus* briefs of other states make similar suggestions.

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United States Government

MEMORANDUM

Date: January 19, 1971

To: William H. Veeder

From: Leon F. Cook, Acting Director, Economic Development

Subject: Requests for assistance and direction as to requests, in regard Eagle River Adjudication and Water Division No. 5, Cases Nos. 87 and 812 before the Supreme Court.

Attached are copies of responses to requests from attorneys for the Fort Mojave Tribe of Indians and the Arapahoe Tribe of the Wind River Reservation, Wyoming, the Hoopa Tribe of the Hoopa Valley Reservation, California, the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, the Quinault Tribe of the Quinault Reservation, Washington, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, and the National Congress of American Indians.

In accordance with those responses you are directed to undertake an in-depth analysis of the facts and law respecting those cases as they relate to (1) overall precedents as to American Indian rights to the use of water; (2) American Indian rights in the Colorado River drainage system.

(Sgd.) Lee
Leon F. Cook

Attachments

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UNITED STATES DEPARTMENT OF THE
INTERIOR

BUREAU OF INDIAN AFFAIRS

Washington, D. C. 20242

January 21, 1971

Mr. Glen A. Wilkinson
Wilkinson, Cragun & Barker
1616 H. Street N. W.
Washington, D. C. 20006

Dear Mr. Wilkinson:

Thank you for your letter dated December 22, 1970, in regard to the Eagle River Adjudication and Water Division No. 5, cases now pending before the Supreme Court of the United States. Both cases involve the Colorado River stream system.

In accordance with your letter Mr. Veeder has been directed to undertake a full review of those cases as they relate to the rights to the use of water of the American Indians within the Colorado River drainage and as to the broader aspects of the precedents which may emerge from the decisions of the Court.

Sincerely yours,

(Sgd.) Louis R. Bruce
Commissioner

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UNITED STATES DEPARTMENT OF THE
INTERIOR
BUREAU OF INDIAN AFFAIRS
Washington, D. C. 20242

January 21, 1971

Mr. Raymond C. Simpson
406 Security Bank Building
110 Pine Avenue
Long Beach, California 90802

Dear Mr. Simpson:

Thank you for your telegram dated December 16, 1970, in regard to the Eagle River Adjudication and Water Division No. 5, cases now pending before the Supreme Court of the United States. Both cases involve the Colorado River stream system.

In accordance with your telegram Mr. Veeder has been directed to undertake a full review of those cases as they relate to the rights to the use of water of the American Indians within the Colorado River drainage and as to the broader aspects of the precedents which may emerge from the decisions of the Court.

Sincerely yours,
(Sgd.) Louis R. Bruce
Commissioner

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HARTLEY, OLSON & BACA

Attorneys at law

P. O. Box 465

311 Sixth Street, N.W.

Albuquerque, New Mexico 87103

February 12, 1971

The Honorable Louis R. Bruce
Commissioner of Indian Affairs
1745 N Street
Washington, D. C.

Re: Eagle River Adjudication—State of Colorado
#87, October Term, 1970—Supreme Court

Dear Commissioner:

Your attention is invited to the Eagle River Adjudication suit in the State of Colorado (United States vs. The District Court in and for the County of Eagle, State of Colorado, No. 87, October term, 1970, United States Supreme Court). As attorney for the All Indian Pueblo Council and several of the individual Indian tribes within New Mexico, I am gravely concerned over the far-reaching effects of the decision in this case, should the United States Supreme Court sustain certain views which are being presented therein. The precedents to be established may have far reaching effects and are of major concern to the Indian Pueblos of New Mexico, particularly as they may affect the present Rio Grande Adjudication.

Accordingly, I think most serious attention must be given by you and your staff to the positions taken in this case to see that the Indian interests are protected. Further, may I suggest that your immediate and prompt

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attention be given to this case with the thought in mind that perhaps a conference may be arranged at an early date between your appropriate staff members and the attorneys representing Indian tribes whose water rights may be directly or indirectly affected by the decision.

We thank you for your attention to this matter.

Very truly yours,

HARTLEY, OLSON & BACA

(Sgd.) Thomas O. Olson

Thomas O. Olson

TOO/cj

Supreme Court, U.S.

FILED

FEB 12 1971

E. Robert Seaver, Clerk

Available—February 16, 1971

In the Supreme Court of the United States, October Term, 1970. No. 812.

United States of America, *Petitioner* v. The District Court in and for Water Division No. 5, State of Colorado, and the Judge Thereof, the Honorable Clifford H. Darrow, and the Water Referee Thereof.

On Writ of Certiorari to the Supreme Court of the State of Colorado.

BRIEF OF RESPONDENT COURT AND THE
COLORADO RIVER WATER CONSERVA-
TION DISTRICT

* * * * *

February 12, 1971

STATUTES INVOLVED

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148-21-17. Administration and distribution of waters.

—(1) The state engineer shall be responsible for the administration and distribution of the waters of the state, and in each division such administration and distribution shall be accomplished through the offices of the division engineer as specified in this article.

(3) In the distribution of water, the division engineer in each division and the state engineer shall be governed by the priorities for water rights and conditional water rights established by adjudication decrees entered in proceedings concluded or pending on the effective date of this article and by the priorities for water

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rights and conditional water rights determined pursuant to the provisions of this article. All such priorities shall take precedence in their appropriate order over other diversions of water of the state.

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148-21-20. Proceedings by the water judge.—(1) On . . . the first Tuesday of April and October in division 5 . . . the water judge for the . . . division shall commence hearings with respect to the subject matter of protests filed and orders of rereferral entered by the referee during the preceding six calendar months. Such matters shall generally be considered by the water judge in chronological order, however, the dates and times of hearings shall be adjusted by the water judge at his discretion for the convenience of persons involved or for other reasonable cause.

* * * * *

(5) A decision of the water judge will respect to a protested ruling of the referee shall either confirm, modify, reverse or reverse and remand such ruling, and in the case of the modification of a ruling the decision may grant a different priority than that granted by the referee and may specify its own terms and conditions with respect to a change of water right or plan for augmentation. A decision of the water judge in regard to a matter which has been rereferred by the referee shall dispose fully of such matter and may contain such provisions as the water judge deems appropriate. The water judge shall confirm and approve as part of his judgment and decree a ruling of the referee with respect to which no protest was filed, provided that the water judge may reverse or reverse and remand any such ruling which he deems to be contrary to law.

(9) Appellate review shall be allowed to the judgment and decree, or any part thereof, as in other civil actions, but no appellate review shall be allowed with respect to that part of the judgment or decree which confirms a ruling with respect to which no protest was filed.

QUESTIONS PRESENTED³

- (1) Whether under 43 U.S.C. 666, a State court in adjudicating water rights under State law can obtain jurisdiction over the United States.
- (2) Whether, upon joinder of the United States pursuant to 43 U.S.C. 666, the United States must present all of the water rights it owns or claims, including those it may claim as reserved rights, for adjudication with the claims of others.

STATEMENT

This case raises in our view the identical questions, stated just above, as posed in *United States v. The District Court in and for the County of Eagle and State of Colorado, et al.*, No. 87, this term (hereinafter No. 87). There are, of course, certain factual differences which we treat in this statement, but the same basic issue of state court jurisdiction is presented in both cases.

* * * * *

The Colorado Supreme Court had already decided precisely the opposite in the *Eagle County* case (No. 87) and thus promptly denied, *en banc*, the writ applied for (App. 27). The United States then filed here for certiorari and, just as in No. 87, we supported the application for the writ because of the importance of a

³This footnote omitted here.

decision now on the same basic question of jurisdiction which both cases present.⁹

SUMMARY OF ARGUMENT

The jurisdictional issue, which is all this Court need decide to dispose of both cases, was offered in sharp focus by the United States when it came here seeking certiorari in No. 87. There, after admitting the decision below did not terminate the entire litigation, to assure the Court there was finality of judgment below permitting review, the Government noted:

" . . . Since [the jurisdictional] issue is *clearly separable* from the merits of the litigation pending in the State district court (the relative rights and priorities of the claimants of water rights in Water District 37), and is not subject to further review in the Colorado courts, the judgment is final for purposes of this Court's jurisdiction. . . ." (Pet. in No. 87, then No. 1178, Oct. Term, 1969 at 9, emphasis added).

This "clearly separable" issue, as stated by the United States was whether:

" . . . the Colorado district court has jurisdiction under a federal statute to adjudicate the water rights of the United Statse, including its reserved rights." (id.)

* * * * *

⁹In conferences among counsel while the petition for certiorari was pending in No. 812 there was mutual recognition of the desirability for ongoing proceedings on water matters in the respondent court in the interests of the proper administration of the 1969 Act and, at the same time, of the effect that the various deadlines in that Act could have upon any rights of the United States in its absence. This led to an unopposed request for a stay by this Court, which stay has been implemented by agreement among counsel on the language to be inserted in decrees which will hold the rights of the United States in status quo pending the decision of this Court.

(See APPENDIX, Page 58.)





NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE ET AL.

CERTIORARI TO THE SUPREME COURT OF COLORADO

No. 87. Argued March 2, 1971—Decided March 24, 1971

This case arises from the attempted joinder pursuant to 43 U. S. C. § 666 of the United States as a defendant in a proceeding in state court for the adjudication of water rights covering the Eagle River system in Colorado. Under § 666 (a) "[c]onsent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States [owns] or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise" The United States contended that § 666 applies only to water rights that it had acquired under state law and does not constitute consent to have adjudicated in a state court the Government's reserved water rights arising from withdrawals of land from the public domain. Its objection was overruled by the trial court and the Colorado Supreme Court denied the Government's motion for a writ of prohibition. *Held*: Section 666 (a) is an all-inclusive statutory provision that subjects to general adjudication in state proceedings all rights of the United States to water within a particular State's jurisdiction regardless of how they were acquired. Any conflict between adjudicated rights and reserved rights of the United States, if preserved in the state proceeding, can ultimately be reviewed in this Court. Pp. 2-5.

— Colo. —, 458 P. 2d 760, affirmed.

MR. JUSTICE DOUGLAS delivered the opinion for a unanimous Court. MR. JUSTICE HARLAN, though joining in the opinion, filed a concurring statement.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 87.—OCTOBER TERM, 1970

United States, Petitioner,

v.

District Court in and for
the County of Eagle
and State of Colorado
et al.

On Writ of Certiorari to the
Supreme Court of Colorado.

[March 24, 1971]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Eagle River is a tributary of the Colorado; and Water District 37 is a Colorado entity encompassing all Colorado lands irrigated by water of the Eagle and its tributaries. The present case started in the Colorado courts and is called a supplemental water adjudication under Colo. Rev. Stat. 1963, 148-9-7. The Colorado court issued a notice which, *inter alia*, asked all owners and claimants of water rights in those streams "to file a statement of claim and to appear . . . in regard to all water rights owned or claimed by them." The United States was served with this notice pursuant to 43 U. S. C. § 666.¹ The United States moved to be dismissed as a

¹ 43 U. S. C. § 666 (a), 66 Stat. 560, provides:

"Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have

party, asserting that 43 U. S. C. § 666 does not constitute consent to have adjudicated in a state court the reserved water rights of the United States.

The objections of the United States were overruled by the state District Court and on a motion for a writ of prohibition the Colorado Supreme Court took the same view. — Colo. —, 458 P. 2d 760. The case is here on a petition for certiorari, which we granted. 397 U. S. 1005.

We affirm the Colorado decree.

It is clear from our cases that the United States often has reserved water rights based on withdrawals from the public domain. As we said in *Arizona v. California*, 373 U. S. 546, the Federal Government had the authority both before and after a State is admitted into the Union "to reserve waters for the use and benefit of federally reserved lands." *Id.*, at 597. The federally reserved lands include any federal enclave. In *Arizona v. California* we were primarily concerned with Indian reservations. *Id.*, 598-601. The reservation of waters may be only implied and their amount will reflect the nature of the federal enclave. *Id.*, 600-601. Here the United States is primarily concerned with reserved waters for the White River National Forest, withdrawn in 1905, Colorado having been admitted into the Union in 1876.

The United States points out that Colorado water rights are based on the appropriation system which requires the permanent fixing of rights to the use of water at the time of the adjudication, with no provision for

waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under the circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit."

the future needs, as is often required in case of reserved water rights.² *Arizona v. California*, at 600-601. Since those rights may potentially be at war with appropriated rights, it is earnestly urged that 43 U. S. C. § 666 gave consent to join the United States only for the adjudication of water rights which the United States acquired pursuant to state law.

The consent to join the United States "in any suit (1) for the adjudication of rights to the use of water of a river system or other source" would seem to be all-inclusive. We deem almost frivolous the suggestion that the Eagle and its tributaries are not a "river system" within the meaning of the Act. No suit by any State could possibly encompass all of the water rights in the entire Colorado River which runs through or touches many States. The "river system" must be read as embracing one within the particular State's jurisdiction. With that to one side, the first clause of § 666 (a)(1), read literally, would seem to cover this case for "rights to the use of water of a river system" is broad enough to embrace "reserved" waters.

The main reliance of the United States appears to be on Clause 2 of § 666 (a) which reads:

" . . . for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise."

This provision does not qualify § 666 (a)(1), for (1) and (2) are separated by an "or." Yet even if "or" be read as "and," we see no difficulty with Colorado's position. Section 666 (a)(2) obviously includes water rights previously acquired by the United States through appropriation or presently in the process of being so acquired.

² See *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446; *Mason v. Hill Land & Cattle Co.*, 119 Colo. 404.